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Stays Pending Appeal and Judicial Review: What You Need to Know

By Marco P. Falco

The commencement of an appeal or application for judicial review may not stop the enforcement of the lower Court or tribunal's order.

In Ontario, the issue of whether a decision or an order is stayed pending an appeal or judicial review depends on a complex web of statutes and civil procedure rules.

Parties who seek to, or seek leave to, appeal or begin an application for judicial review, may be surprised to learn that there is no automatic stay of the underlying order, in which case an urgent motion for such relief is required.

On the other hand, if a stay is automatic, the respondent may have good reason to want to lift it, pending the resolution of the appeal.

In navigating these rules, parties must take into account many key considerations. These include:

1. What is the Effect of a Stay?

A party seeking a stay pending an appeal, motion for leave to appeal, or application for judicial review will want to consider its effect and whether it is worth the effort.

Broadly speaking, in Ontario, where an order is stayed, no steps may be taken under the underlying order or for its enforcement except by Court Order: *see Rules of Civil Procedure*, R.R.O. 1990, c.C.43 (the "Rules"), at Rule 63.03(1).

However, a stay does not prevent the settling of the underlying order, nor will it prevent the assessment of costs of the underlying matter: *see Rules, supra* at Rule 63.03(2).

Further, a stay does not prevent the issuance of a writ of execution or the filing of the writ in a sheriff or land registry's office: *see* Rules, *supra* at Rule 63.03(3).

2. Is There an Automatic Stay Pending Appeal?

The governing statute may provide for an automatic stay of the underlying order upon the commencement of an appeal or judicial review. This is the first place counsel should look.

In Ontario, for appeals from lower Court decisions, the general rule (with several notable exceptions) is that the service of a notice of appeal automatically stays an order for the "payment of money", other than a support order or support enforcement order: *see Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at Rule 63.01(1).

The automatic stay of an order requiring the payment of money, other than support payments, "safeguards the appeal process by preserving the appellant's access to the money to fund the appeal and continued possession of it in the event that the appeal is successful": *see Antunes v. Limen Structures Ltd.*, 2016 ONCA 61 at para. 11.

This general automatic stay rule under Rule 63.01(1) does not apply, however, where leave to appeal is required or where the lower Court has ordered non-monetary relief, in which case the appellant must apply to Court for a stay: *see* Rule 63.02(1)(b).

Nor does the automatic stay apply to orders for default judgment: *see* Rule 63.01(2).

As the respondent on an appeal, if the order you were successful in obtaining is subject to an automatic stay pending appeal, you may want to consider bringing a motion to "lift" the stay.

Rule 63.01(5) allows a judge of the Court to which the appeal is taken to order that the automatic stay does not apply.

Generally, motions to lift automatic stays should be restricted to "cases of demonstrable and unusual hardship to the respondent and where a reasonable measure of protection can be afforded to the appellant". The Court considers the "general circumstances of the case" and gives weight to three factors:

- The financial hardship to the respondent if the stay is not lifted;
- The ability of the respondent to repay or provide security for the amount paid; and
- The merits of the appeal.

See SFC Litigation Trust (Trustee of) v. Chan, 2018 ONCA 710 at paras. 7-10.

3. Does the Appellant Require an Order for a Stay?

If there is no automatic stay, the appellant or applicant may need to consider if the Court has the jurisdiction to order a stay pending the appeal or application for judicial review.

The governing statute, if it provides for a right of appeal or judicial review, will usually indicate whether the Court has the power to stay the underlying order or decision.

For appeals or judicial review applications to which the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 (the "SPPA") applies, and where the governing statute does not provide to the contrary, or the tribunal or Court does not order otherwise, an appeal from a decision of a tribunal to a Court or other appellate body operates as a stay: *see* SPPA, *supra* at s.25(1).

However, the same is not true of applications for judicial review, which are not considered "appeals" for the purposes of the stay provisions under the SPPA: *see* SPPA, *supra* at s.25(2).

For appeals from lower Court decisions, Rule 63.02 grants the Court whose decision is to be appealed, or

the Court hearing the appeal or motion for leave to appeal to stay an interlocutory order “on such terms as are just”: *see* Rule 63.02.

4. What is the Test for a Stay Pending Appeal / Motion for Leave to Appeal / Judicial Review?

Where there is no automatic stay of the underlying order, the appellant (or applicant for judicial review) will be required to bring a motion for a stay.

Where leave to appeal is required, an interim stay may be granted, without prejudice to the position of the parties on a motion for a stay pending appeal if leave to appeal is granted, where the moving party can show:

- There is some merit (a serious issue to be tried) in respect of the leave motion;
- The moving party will suffer irreparable harm if a stay is not granted; and
- The balance of convenience favours granting a stay.

See Vecchio Longo Consulting Services Inc. v. Aphria Ltd., 2021 ONSC 5953, at para. 3; *Urbancorp Toronto Management Inc. (Re)*, 2021 ONCA 613 at para. 10, citing *RJR-MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311.

The test above, which is similar to the test applicable for interlocutory injunctions generally under the Supreme Court of Canada’s 1994 decision, *RJR-MacDonald Inc. v. Canada (AG)*, *supra*, also applies to non-automatic stays pending appeal in Ontario, where leave to appeal is not required: *see Budarick v. Brudenell, Lyndoch and Raglan (Township) (Integrity Commissioner)*, 2021 ONSC 8034, at para. 4, citing *Yaiguaje v. Chevron Corporation*, 2014 ONCA 40, at para. 3.

The same test also applies with respect to motions for a stay pending an application for judicial review: *see Audio Visual Services (Canada) Corp. v. Ontario (Labour Relations Board)*, 2019 ONSC 1167, at para. 2.

Beware the Unversed Appellate Lawyer

The potential for the unversed lawyer to make a fatal error with respect to the need, right or effect of a stay is high.

Some of the most common mistakes made by litigators when seeking review of an underlying order involve a failure to consider:

- Whether a stay is automatic or leave of the Court is required to obtain it;
- Whether the governing statute provides the Court with the jurisdiction to grant a stay; or
- Whether the test for a stay, if leave is required, is met.

Counsel should approach all of these questions with caution. A mistake could very well prejudice your client’s rights. Where necessary, lawyers should contact experienced appellate counsel to determine the proper course before a serious error is made.

For more information on stays and civil appeals or applications for judicial review generally, contact Marco P. Falco, Partner in the Litigation Department at Torkin Manes LLP, at mfalco@torkinmanes.com.

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