

OLYMPIC MOTORS (SK) I CORPORATION, operating as AUTO GALLERY SUBARU, and THOMAS GLEN, as Director of OLYMPIC MOTORS (SK) I CORPORATION, Applicants v CASSANDRA FOWLER, Respondent and THE DIRECTOR OF EMPLOYMENT STANDARDS, Respondent

LRB File Nos. 200-23 and 002-24; January 31, 2024

Chairperson, Michael J. Morris, K.C. (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act*)

Counsel for the Applicants, Olympic Motors (SK) I Corporation and Thomas Glen:

Kevin C. Mellor and
Moira Keijzer-Koops

The Respondent, Cassandra Fowler:

No one appearing

The Respondent,
The Director of Employment Standards:

No one appearing

Stays under Part IV of *The Saskatchewan Employment Act* – Procedure when applying for a stay pending an appeal of an adjudicator’s decision – Discussion of legal framework applied by Board in considering whether to grant a stay – Board grants stay.

REASONS FOR DECISION

Background:

[1] **Michael J. Morris, K.C., Chairperson:** These are the Board’s reasons regarding a request to stay the effect of an adjudicator’s decision pending an appeal from it.

[2] The following chronology describes the relevant procedural history:

- a) On May 25, 2022, the Director of Employment Standards [Director] caused a wage assessment in the amount of \$13,173.03 [Wage Assessment] to be issued in favour of Cassandra Fowler [Ms. Fowler].
- b) Olympic Motors (SK) I Corporation [Company] and Thomas Glen [Mr. Glen] appealed the Wage Assessment to an adjudicator [Adjudicator], who dismissed the appeal and upheld the Wage Assessment [Adjudicator’s First Decision].

- c) The Company and Mr. Glen then appealed the Adjudicator's decision to the Board, pursuant to s. 4-8 of *The Saskatchewan Employment Act* [Act].¹ In reasons reported at *Olympic Motors (SK) I Corporation v Fowler*, 2023 CanLII 92979 (SK LRB) [Board's Decision], the Board allowed the appeal and remitted the matter to the Adjudicator, with directions. In brief compass, the Board determined that the analysis in the Adjudicator's First Decision was incomplete, particularly regarding her conclusion that Ms. Fowler did not commit time theft.²
- d) Following the Board's Decision, the Adjudicator rendered a second decision on December 7, 2023 [Adjudicator's Second Decision], which provided additional reasoning and affirmed the Wage Assessment.
- e) On December 27, 2023, the Company and Mr. Glen filed a notice of appeal with respect to the Adjudicator's Second Decision, pursuant to s. 4-8 of the Act [Underlying Appeal]. They have requested that enforcement of the Wage Assessment be stayed pending determination of the Underlying Appeal by the Board.

[3] The Company and Mr. Glen [Applicants] filed a brief in support of their request for enforcement of the Wage Assessment to be stayed pending determination of the Underlying Appeal.

[4] Neither of the Respondents filed any material in response to the Applicants' request.

Argument on behalf of the Applicants:

[5] In considering their request for a stay, the Applicants submit that the Board should apply the test for injunctive relief articulated by the Court of Appeal in *Saskatoon Co-op*.³ In other words, it should examine whether the appeal is frivolous or vexatious, whether there is a meaningful risk of them sustaining irreparable harm without a stay, and whether the balance of convenience favours granting a stay.

[6] The Applicants submit that the Underlying Appeal is neither frivolous nor vexatious. In terms of irreparable harm, they raise the prospect of being unable to recover funds paid to Ms. Fowler pursuant to the Wage Assessment if they are successful in the Underlying Appeal. Finally, the Applicants submit that the balance of convenience favours granting a stay. They point to a

¹ *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act], s 4-8.

² See the Board's Decision at paras 69-70, 74-75, 96 and 100.

³ *Saskatoon Co-operative Association Limited v United Food and Commercial Workers, Local 1400*, 2022 SKCA 40 [Saskatoon Co-op].

stay having been issued by the Board following the Adjudicator's First Decision,⁴ and submit that the potential prejudice to them (in not being able to recover funds if successful in the Underlying Appeal) exceeds the potential prejudice to Ms. Fowler (in having to wait for funds if the Wage Assessment is upheld).

Relevant Statutory Provisions:

[7] Subsection 4-8(5) states:

4-8 ...

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

[8] Though not in issue here, a similar provision, s. 4-10(4), applies to appeals initiated by the Director or the Director of Occupational Health and Safety pursuant to s. 4-10(1)(b).

Analysis and Decision:

[9] This decision provides the Board with the opportunity to articulate the framework that it applies when considering whether to issue a stay pending determination of an appeal pursuant to s. 4-8.

[10] A request for a stay is made by completing sections 7, 8 and 9 of Form 1 (Notice of Appeal) of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*.⁵ When an appellant completes these sections, the Board considers the request for a stay therein as an application on behalf of the appellant. Since Form 1 must be sworn or affirmed, factual assertions contained in the abovementioned sections⁶ may be considered by the Board as evidence for the purposes of the application. Respondents are provided the opportunity to file a sworn or affirmed reply in Form 21, and factual assertions contained therein may similarly be considered by the Board as evidence. In addition, the Board may receive affidavit evidence from the parties, if tendered.

⁴ That stay, issued February 16, 2023, was in place until the Board's Decision was issued.

⁵ *Saskatchewan Employment (Labour Relations Board) Regulations, 2021*, RRS c S-15.1 Reg 11. Form 1 contemplates an appellant providing an attachment for the purposes of section 9, if necessary.

⁶ Or as an attachment for the purposes of section 9, if necessary.

[11] To state the obvious, in hearing appeals pursuant to s. 4-8, the Board is sitting as an appellate body.⁷ In this regard, it exercises a similar function with respect to adjudicators' decisions as the Court of Appeal does with respect to decisions of the Court of King's Bench.⁸

[12] Former Chief Justice Richards articulated the framework the Court of Appeal applies when deciding whether to grant a stay pending an appeal in *J.L.*⁹ More recently, Chief Justice Leurer addressed this framework in *Nilson* (emphasis added):

[9] Until Rule 15 was amended effective January 1, 2023, in most circumstances the filing of a notice of appeal against a judgment resulted in an automatic stay of its execution, unless that stay was set aside. Now the situation is reversed. A party who appeals against a judgment must apply to have its execution stayed. ...

*[10] Although the starting point under Rule 15 has in most cases changed, the overall purpose of the Rule remains the same. *Lawson v Rees*, [2016 SKCA 37](#), 396 DLR (4th) 472 [Lawson], dealt with an appeal against an order for spousal support, which was a situation where, under the previous iteration of Rule 15, the filing of a notice of appeal did not give rise to an automatic stay of execution. Instead, a party who thought that a spousal support order should not be enforced while it was under appeal was required to apply for a stay of its execution – just as is now the case under Rule 15. In *Lawson, Ryan-Froslic J.A.* referred to what she described as the “well-settled” principles for when to lift a stay and then added that “the same objectives apply when imposing a stay, namely, to prevent injustice, to ensure the result is as fair and equitable as possible for all sides, to minimize prejudice and to balance the competing interests” (at para 8, emphasis in original). There are many other cases that have applied similar principles to a determination of whether to impose a stay of execution or to lift one. See, for example, *Abrametz v The Law Society of Saskatchewan*, [2019 SKCA 21](#) at para 12, *Goodman v Saskatchewan (Community Operations)*, [2020 SKCA 51](#) at paras 41–44, and *Turtle v Valvoline Canadian Franchising Corp.*, [2021 SKCA 46](#) at paras 23–26 [Turtle].*

*[11] Both parties appropriately refer to *J.L. v T.T.*, [2023 SKCA 43](#), 91 RFL (8th) 305 [J.L.], as establishing the framework that I should apply in my consideration of the Nilsons' request for a stay of execution. In that case, Richards C.J.S. directed that, generally speaking, the same principles that guide the grant of an interlocutory injunction or a stay of proceedings – as summarized by this Court in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc.*, [2011 SKCA 120](#), 341 DLR (4th) 407 – should apply when there is a request for a stay of execution. In this regard, he wrote as follows:*

[16] The summary in Mosaic does not translate perfectly into the context of an application to stay a lower court decision pending the resolution of an appeal. However, as modified to fit the Rule 15 context, it suggests that a decision about whether to grant a stay should be made by proceeding as follows:

(a) The first step will normally be an assessment of the strength of the appeal. The general rule should be that, unless the appellant has raised a serious question as to the validity of the judgment under appeal, a stay is

⁷ The Board's appellate jurisdiction replaces that which formerly resided with the Court of Queen's Bench (as it then was). See *Marcel Pelletier v Touchwood Agency Tribal Council*, 2023 CanLII 61388 (SK LRB), at paras 50-51.

⁸ The Board's function with respect to adjudicators' decisions is also analogous to the function the Court of Appeal exercises with respect to decisions of the Board if leave to appeal is granted pursuant to s. 4-9 of the Act. See, for example, *Lepage Contracting Ltd. v McCutcheon*, 2023 SKCA 83.

⁹ *J.L. v T.T.*, 2023 SKCA 43 [J.L.].

not appropriate. In other words, an appeal that is frivolous or vexatious cannot ground a stay. If the case is determined to involve a serious ground of appeal, the judge should turn to a consideration of irreparable harm and balance of convenience.

(b) Irreparable harm is best seen as an aspect of the balance of convenience. The usual approach here is that the appellant must establish at least a meaningful doubt as to whether the loss they might suffer if the judgment is enforced during the time it takes for the appeal to be heard and decided will be something that is adequately compensable in damages that they would be able to recover. Put another way, the appellant must demonstrate a meaningful risk of irreparable harm. If this is done, the analysis turns to the balance of convenience proper.

(c) The assessment of the balance of convenience will usually be the core of the analysis. In this regard, the relative strength of the appellant's case, the relative likelihood of irreparable harm, and the likely amount and nature of such harm will typically all be relevant considerations. Depending on the particulars of the case, strength in relation to one of these matters might compensate for weakness in another. Centrally, the judge must weigh the risk of the irreparable harm the appellant is likely to suffer before the appeal is decided if the stay is not granted, and they ultimately succeed on appeal, against the risk of the irreparable harm the respondent is likely to suffer if the stay is granted and they prevail on appeal. Nonetheless, the balance of convenience analysis is compendious. It can accommodate a range of equitable and other considerations.

[12] Chief Justice Richards added that “there may be some limited circumstances where the line of approach just set out will not be directly applicable or where the subject matter of the case demands a special approach to the assessment of the equities of the situation” (J.L. at para 18). However, in this case, both parties argued on the basis that the J.L. framework is appropriately utilized to determine the outcome of the Nilsons’ application.¹⁰

[13] Generally, the purpose of a stay is to prevent prejudice (harm) to an appellant that may arise if a decision is enforced while an appeal from it is pending. However, imposing a stay can result in prejudice to a respondent, since they are prevented from enforcing the decision while the stay is in effect. When faced with an application for stay, the Board balances the parties’ competing interests by applying similar principles to those described in the *J.L./Nilson* framework, as explained below.

[14] First, the Board must consider the strength of the appeal. Simply put, the Board will not stay a decision’s effect if the appeal from it is frivolous or vexatious. An appellant requesting a stay must satisfy the Board that their appeal raises an arguable ground that could potentially affect the result under appeal. The Board does not consider the merits of the appeal beyond this relatively low threshold at this stage of the analysis.

¹⁰ *Nilson v ABO Transport Ltd.*, 2024 SKCA 3 [*Nilson*], at paras 9-12.

[15] Next, the Board must consider whether the appellant has established a meaningful risk of irreparable harm if a decision is enforced while their appeal from it is pending. In basic terms, irreparable harm is generally understood as harm that will not be able to be remedied, or adequately remedied, through the recovery of compensation. A meaningful risk of irreparable harm can include being required to compensate a respondent in accordance with a decision if there is a meaningful risk of being unable to recover funds in the event of a successful appeal. This tends to be the most common type of irreparable harm alleged in the context of employers' appeals concerning wage assessments. In other appeals, such as those where an employee is required to be (or not required to be) reinstated as a consequence of an adjudicator's decision, different concerns may arise. In such circumstances, reasonably detailed affidavit evidence may be required to establish the meaningful risk of irreparable harm. This is not to say that affidavit evidence is not appropriate in other circumstances, including where the potential irreparable harm is the inability to recover money already paid in spite of a successful appeal. Whether affidavit evidence is strictly necessary, in addition to the factual assertions an appellant makes in Form 1 (or a respondent makes in Form 21), will depend on the circumstances of any given case.

[16] Provided an appeal is not frivolous or vexatious and the appellant has established a meaningful risk of irreparable harm, the Board will assess the balance of convenience. Fundamentally, the Board must weigh the risk of the irreparable harm the appellant may suffer if the stay is not granted and they ultimately succeed on appeal, against the risk of any irreparable harm the respondent may suffer if the stay is granted and they prevail on appeal. In conducting this exercise, non-exhaustive factors the Board may consider include the relative strength of the appellant's case, the relative likelihood of any irreparable harm as between the appellant and the respondent, and the likely amount and nature of such harm. In considering these factors, of course, the Board must be mindful that it is not deciding the merits of the appeal at this stage of the proceedings. That is for another day, after hearing full argument on the merits from the parties.

[17] Finally, a stay is not an all or nothing proposition. The Board may stay the effect of an adjudicator's decision either in whole or in part, based on its assessment of the balance of convenience.

[18] The Board will now proceed to assess the Applicants' request for a stay against the above-described framework.

[19] The Board is satisfied that the Applicants' appeal is not frivolous or vexatious. The Board will provide limited comments for its conclusion that the Applicants have met this low bar, given the merits of the appeal will be argued another day. At this point, the Board notes that the Board's Decision stated that any stress Ms. Fowler may have been under was not relevant to the Adjudicator's determination regarding whether she had the requisite intent to commit time theft.¹¹ In the Adjudicator's Second Decision, the Adjudicator referred to Ms. Fowler's evidence about the stress she was under in the context of her credibility, i.e., that it provided an alternate explanation for her surfing the internet while at work, as opposed to an intent to defraud her employer.¹² The Applicants list as a ground of appeal that the Adjudicator considered "irrelevant evidence in justifying why the employee was not responsible or accountable for time theft".¹³ Based on the Board's Decision, this appears to be an arguable ground of appeal that could potentially affect the result under appeal.

[20] The Board is satisfied that there is a meaningful risk of irreparable harm to the Applicants, insofar as they may be unable to recover funds paid to satisfy the Wage Assessment if they are successful in their appeal.

[21] With respect to the balance of convenience, the Board notes that some of the grounds of appeal may be repetitive of grounds that were considered and rejected in the Board's Decision. That said, the Board has no evidence or submissions from the Respondents to weigh against the risk of irreparable harm asserted by the Applicants. On balance, the Board concludes that the stay requested by the Applicants should be granted.

[22] An appropriate order will accompany these reasons.

DATED at Regina, Saskatchewan, this **31st** day of **January, 2024**.

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson

¹¹ Board's Decision, paras 68-69.

¹² Adjudicator's Second Decision, p 7.

¹³ Applicants' Notice of Appeal (Form 1), ground (e).