

Court of Appeal denies stay of termination of commercial tenancy

Appeals | Litigation | Litigation & Dispute Resolution | Motion

23 June 2023

Under Ontario's *Rules of Civil Procedure*, a party which commences an appeal of a Court Order for the payment of money is entitled to an automatic stay of any provision contained therein, except a provision that awards support or enforces a support order. For any other provision, an appealing party must bring a motion to stay the Court Order pending appeal.

In a previous GR Docket, we wrote about a case in which our lawyers successfully defeated a commercial tenant's attempt to remain in leased premises at a hospital despite being unable to operate a Tim Hortons franchise from the premises as required under the tenant's lease. Specifically, on an application brought by the tenant to remain in the leased premises, an application judge had determined that the tenant was in breach of its obligations under the lease. The application judge also found that the tenant was not entitled to relief from forfeiture of its breach.

The commercial tenant has appealed the decision contending that the court misinterpreted the lease and that the hospital had no right to terminate it if the tenant failed to operate a Tim Hortons franchise, and, alternatively, that it was entitled to relief from forfeiture on equitable grounds even if the lease was breached.

Pending the appeal, the tenant brought a motion for a stay of the termination of its lease. In *Michael Garron Hospital v. Metro 1 Development Corp.*, M54311 (COA-23-CV-0555), 13 June 2023, the Court of Appeal dismissed the tenant's motion to stay the termination of the lease. The test for granting a stay of proceedings is governed by a three-part test. This test can be found in the seminal decision of *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC). The party seeking the stay must establish that:

- i) there is a serious issue to be tried/heard on appeal;
- ii) they will suffer irreparable harm if the stay is not granted; and
- iii) the balance of convenience favours a stay.

Although all three parts of the test must be satisfied, a Court is directed to approach a stay motion in a holistic manner and determine whether it is in the interests of justice to grant a stay.

In this matter, the Court found that the tenant satisfied the first part of the test because even though the grounds raised by tenant on its appeal had been thoroughly considered by the application judge, they were neither frivolous nor vexatious.

However, the tenant was unable to satisfy the second or third branches of the test.

While the tenant contended that it would suffer irreparable harm as a result of the termination of the lease, the tenant provided no explanation as to the nature of its harm. The tenant argued that if it was successful on appeal and the lease was found to have been wrongly terminated, calculating damages would be very difficult.

However assuming that the tenant was successful on appeal, the Court ruled that any difficulty in calculating damages did not mean that the tenant could not be adequately compensated for its loss.

The Court explained that Courts are regularly required to calculate monetary damages notwithstanding that a precise calculation might be difficult.

The fact that the tenant also was seeking relief from forfeiture did not preclude a Court from granting an appropriate remedy if that ground of appeal was successful.

Lastly, the Court found that the balance of convenience favoured the hospital. For morale reasons, hospital staff wanted a Tim Hortons franchise to be operated from the building. This was an important concern for the hospital.

The granting of the stay would mean that a Tim Hortons franchise would not be located in the hospital until the case was finally determined. The Court found that:

These impacts on staff morale (and potentially on healthcare provided to patients at the hospital) are relevant in assessing the balance of convenience and are an additional reason why a stay should not be granted...

Representation by Gardiner Roberts LLP

The hospital was represented on the motion by Alexander Melfi. Mr. Melfi is a partner and a litigation lawyer in the Dispute Resolution Group at Gardiner Roberts LLP. A PDF version is available to download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Alexander Melfi

Partner and Co-Chair of the Litigation and Dispute Resolution Group

416.865.6712

amelfi@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com