

NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Workers' Compensation Board) v. O'Brien*, 2026 NSCA 5

Date: 20260120

Docket: CA 548539

Registry: Halifax

Between:

Workers' Compensation Board of Nova Scotia

Appellant

v.

Patricia O'Brien, the Nova Scotia Workers' Compensation
Appeals Tribunal, GEM Healthcare Group Limited, and
the Attorney General for the Province of Nova Scotia

Respondents

Judge: Gogan, J.A.

Motion Heard: December 4, 2025, in Halifax, Nova Scotia in Chambers

Written Decision: January 20, 2026

Held: Motion dismissed

Counsel: Roderick (Rory) H. Rogers, K.C., for the appellant, with
Paula Arab, K.C.
Vanessa G. Nicholson, for the respondent Patricia O'Brien,
with Danielle St. George
Alison Hickey, for the respondent Workers' Compensation
Tribunal Appeal Board (watching brief)
Syed M. Hussain, for GEM Health Care Group Limited (not
participating)
Edward A. Gores, K.C., for the respondent Attorney General
of Nova Scotia (not participating)

Chambers Decision:

Overview

[1] In a decision made on September 26, 2025, the Nova Scotia Workers' Compensation Tribunal ("WCAT") determined Patricia O'Brien's 2015 compensable injury materially contributed to knee problems she has been reporting since 2019. As a result of that decision, the Workers' Compensation Board ("the Board") undertook a calculation of earnings replacement benefits owed to Ms. O'Brien. As of November 26, 2025, the amount was \$77,344.61.

[2] The Board sought leave to appeal the WCAT decision. The leave application will be heard on March 18, 2026. The Board now seeks a partial stay of the payment due to Ms. O'Brien. It has paid her the amount of \$11,601.69.¹ The stay would apply to the balance of benefits due to Ms. O'Brien.

[3] The real issue on this motion is with the requirement for the Board to establish irreparable harm. As I will explain, I am not satisfied the Board will suffer irreparable harm if a stay is not granted. For this reason, the motion is dismissed.

The Guiding Principles

[4] The principles guiding a stay application are well established. A notice of appeal does not stay the execution of the decision under appeal. The decision is presumed correct and a successful litigant is entitled to the "fruit of its litigation".²

[5] A stay is a discretionary remedy granted to "achieve justice as between the parties in the particular circumstances of their case".³ In *Muir v. Day*, Justice Derrick provided a concise summary of the principles constraining the exercise of discretion:

[6] The discretionary power to enter a stay is structured by the "*Fulton*" test (*Fulton Insurance Agencies Ltd., v. Purdy*, 1990 NSCA 23). Under the *Fulton* test, the party seeking the stay carries the burden of showing, on a balance of probabilities: (1) an

¹ The amount of \$11,601.69 represents approximately 15% of the total amount owing to Ms. O'Brien as of November 26, 2025.

² *MacPhail v. Desrosiers*, 1998 NSCA 5 at para. 21 [*MacPhail*]; *Green v. Green*, 2022 NSCA 30 at para. 10; and *Maynard Holdings v. IForm Works Inc.*, 2022 NSCA 54 at paras. 10-11 [*Maynard*].

³ *Muir v. Day*, 2022 NSCA 34 at para. 5, citing *Hendrickson v. Hendrickson*, 2004 NSCA 98 at para. 11 and *Widrig v. R. Baker Fisheries Ltd.*, 1998 NSCA 20; and *Maynard* at para. 10.

arguable issue for appeal; (2) they would experience irreparable harm if the stay was to be denied; and (3) the balance of convenience favours a stay. The balance of convenience concerns the question of whether the appellant will suffer greater harm if there is no stay than the respondent will suffer if a stay is granted.

[7] In the event the applicant for a stay cannot satisfy the primary test's three criteria, exceptional circumstances may justify the granting of a stay on the basis of it being "fit and just" to do so (*Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 23)...

[8] I am reminded by *Fulton* that the "fairly heavy burden" borne by the applicant/appellant is warranted "considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.

[6] In *Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, MacDonald, C.J.N.S. citing Cromwell, J.A. in *MacPhail*, underscored the discretionary nature of a stay of execution:

9 ...The elaboration of principles to guide the exercise of 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.⁴

[7] In the present case, the parties agree on the governing law but dispute its application.

Application of the Principles

Background and Decision Under Appeal

[8] There is a history to this matter important to an understanding of the issues on appeal and the present motion.

[9] Ms. O'Brien suffered a compensable injury to her left knee on September 3, 2015 while working as a continuing care assistant. She was diagnosed with a knee sprain and treated with physiotherapy. Treatment for the injury concluded in early November of 2015 and Ms. O'Brien subsequently returned to work.

⁴ *Cape Breton Development Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2008 NSCA 11 at para. 9 [*Devco*].

[10] In 2019, Ms. O'Brien reported to the Board that she was having ongoing left knee problems. Initial Board and Hearing Officer decisions on Ms. O'Brien's claim found her knee problems unrelated to her 2015 injury. On July 28, 2022, WCAT returned the matter to the Board, directing it to further investigate the claim with updated imaging and consultation with a specialist. A Board decision made on July 13, 2023 applied its recurrence policy and concluded there was no medical compatibility between the 2015 knee injury and the ongoing knee issues. The Board's decision was upheld by a Hearing Officer on February 6, 2024. Ms. O'Brien appealed to WCAT.

[11] In its decision of September 26, 2025, WCAT allowed Ms. O'Brien's appeal finding "the totality of the evidence is sufficient to conclude that it is at least as likely as not that the left knee problems are causally related, at least in part, to the 2015 left knee injury".⁵ In coming to this conclusion, WCAT reviewed evidence, including conflicting medical opinions, and found: (1) insufficient evidence of notable left knee problems before the 2015 injury, (2) sufficient evidence to accept Ms. O'Brien had continued knee pain following the 2015 injury; and (3) sufficient evidence to conclude "that the Worker's 2015 left knee injury materially contributed to her knee problems reported in 2019 and beyond".⁶

[12] The Board seeks leave to appeal the WCAT decision asserting errors of law on the issue of causation. In its view, requiring it to pay Ms. O'Brien the full amount of her outstanding benefits will result in irreparable harm. It argues both irreparable harm and balance of convenience favour a stay being imposed.

[13] Before considering the Board's arguments, I note the decision under appeal was made on September 26, 2025. The parties received the decision on October 6, 2025. Ms. O'Brien contacted the Board to discuss her benefits the same day and thereafter made inquiries at regular intervals. On November 5, 2025, the Board advised her that it was appealing the WCAT decision and would not be paying her anything pending the appeal. The Board filed its leave application on November 10, 2025 and its stay motion on November 27, 2025. Shortly before the motion hearing, the Board made its partial payment to Ms. O'Brien.

[14] I now turn to the arguments made by the parties on the motion.

⁵ *O'Brien v. Gem Healthcare Group Limited and The Workers' Compensation Board of Nova Scotia*, WCAT # 2024-102-AD at p. 2 [*Decision Under Appeal*].

⁶ *Decision Under Appeal* at pp. 6-7.

The Arguable Issue Question

[15] The first consideration on a stay application is whether an arguable issue exists. In such cases, it is often said the threshold is low with no scrutiny of the merits of the proposed appeal and no speculation as to the eventual outcome.⁷

[16] On this point, the Board asserts an arguable issue exists on WCAT's analysis of causation. While acknowledging the decision under appeal cites the correct test in its conclusion, the Board relies on instances in the decision where other language is used to describe the assessment of causation. It submits there is an argument WCAT erred in law in its assessment of causation. Ms. O'Brien disagrees, citing this Court's decision in *Durnford v. Workers' Compensation Board (N.S.) et al.*⁸

[17] There is reason to approach this first criterion with caution. This is an appeal of a WCAT decision. Such appeals require leave and are restricted to questions of law and jurisdiction. In *Devco*, MacDonald, C.J.N.S. observed in similar circumstances that the appellant "need only establish the existence of an arguable issue that might support the granting of leave to appeal".⁹ In that context, he found the appellant had established an arguable issue.

[18] More recently, in *Maynard*, Derrick, J.A. considered a stay motion pending appeal of a series of interlocutory orders and "sidestepped" the question of whether the appellant had established an arguable issue. She explained her concern about "stepping into territory a panel of this Court will be traversing" as it would be using the same criteria to determine whether leave should be granted.¹⁰

[19] As in *Maynard*, I decline to assess the question of whether an arguable issue has been established, deferring that assessment to the panel hearing the leave application. The arguable issue question, as argued by the parties on this motion, treads very nearly identical ground to that being assessed by the panel on the question of leave. Moreover, the determination of this point is unnecessary as I find the Board's motion can be disposed of on the issue of irreparable harm.

⁷ *Amirault et al. v. Westminer Canada Limited et al.* (1993), 125 N.S.R. (2d) 171 (C.A.) at para. 11.

⁸ *Durnford v. Workers' Compensation Board (N.S.) et al.*, 2000 NSCA 122.

⁹ *Devco* at para. 15.

¹⁰ *Maynard* at paras. 19-27.

Irreparable Harm

[20] The real challenge for the Board is whether it can establish irreparable harm if a stay is not granted. On this point, the Board is concerned it will not recover the amounts paid to Ms. O’Brien if leave is granted and the appeal later allowed. In its written submission, the Board argues irreparable harm will result “if the Worker is unable to repay the full amount”. Implicitly, it contends the potential inability to repay the entire amount is a sufficient basis for irreparable harm.

[21] In support of its contention, the Board offers evidence of Ms. O’Brien’s modest income as well as property online information indicating she and her spouse own a home encumbered by a recent mortgage. The home has a 2025 assessed value of \$123,400. The 2023 mortgage amount was \$85,184.78. It appears Ms. O’Brien and her spouse have owned the home since 2005. There is no evidence to suggest Ms. O’Brien or her spouse are in default of their mortgage or any other debt obligations. Nor is there reason to conclude Ms. O’Brien is in acute financial trouble of any kind. Although it may be challenging for her to reimburse the Board if required, there is no basis in evidence to conclude she wouldn’t honour such a legal obligation.

[22] An inability to repay, or a “real risk” or “serious risk” of such inability may constitute irreparable harm.¹¹ The fact that one party is impecunious is relevant but not determinative.¹² The Board relies on several authorities which focus on a risk of non-recovery and the impact of making a partial payment on the assessment of irreparable harm.¹³ Aside from *Devco*, none of the cases cited by the Board deal with irreparable harm in the context of the payment of workers’ compensation benefits.

[23] What constitutes irreparable harm is “context driven”, taking its meaning from the circumstances.¹⁴ This kind of contextual approach was central to the analysis in *Devco* where the circumstances involved workers’ compensation benefits. MacDonald, C.J.N.S. considered the nature of the workers’ compensation scheme:

¹¹ *Devco* at para. 18 citing *Nova Scotia (Attorney General) v. B.M.G.*, [2007] N.S.J. No. 200 (C.A.) at paras. 13-14 and cases cited there and *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6 at para. 12.

¹² *RJR - MacDonald Inc. v. Canada* (Attorney General), [1994] 1 S.C.R. 311 at p. 341.

¹³ *Nova Scotia (Community Services) v. Campbell*, 2014 NSCA 47 and *Szendroi v. Vogler*, 2011 NSCA 37.

¹⁴ *Nova Scotia v. O’Connor*, 2001 NSCA 47 at para. 47, *MacPhail* at para. 20 and *Devco* at para. 19.

[21] ... it is not a conventional damage award that DEVCO seeks to overturn. It is a workers' compensation benefit. It is the product of an "historic trade-off" where a worker (in this case a dependant) foregoes all rights to sue an employer in return for *immediate* payment regardless of fault or the employer's ability to pay. According to the Supreme Court of Canada:

26 The importance of the historic trade off has been recognized by the courts. In *Reference re Validity of Sections 32 and 34 of the Workers' Compensation Act*, 1983 (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.), Goodridge C.J. compared the advantages of workers' compensation against its principle disadvantage: benefits that are paid immediately, whether or not the employer is solvent, and without the costs and uncertainties inherent in the tort system; however, there may be some who would recover more from a tort action than they would under the Act.

(Emphasis in the original)

[24] Chief Justice MacDonald went on to reason that the assessment of irreparable harm was informed by the nature of the statutory scheme and its historic trade-off, particularly the worker's right to immediate compensation.¹⁵ He recognized the appellant faced a "very serious risk" of not being reimbursed if successful.¹⁶ However, he concluded the appellant's risk, "albeit very real, does not amount to irreparable harm".¹⁷

[25] On the present motion, the Board sought to distinguish *Devco* in several ways. First it argued *Devco* involved a unique set of circumstances, and second, it submitted the purpose and policies of the workers' compensation system have changed since *Devco* was decided in 2008. With respect to the first point, the factual "dilemma" in *Devco* was indeed unique, as observed in the reasons, principally because it was not the Board seeking a stay, but a self-insured Crown corporation whose compensation claims were administered by the Board.¹⁸ On the second point, the Board emphasized it was not prepared to accept the risk of losing an overpayment as it had appeared to be in *Devco*, noting the *Workers Compensation Act* had been amended in 2024 to embed financial responsibility and accountability into its purpose.¹⁹ There have also been revisions to the Board's overpayment recovery policy.

¹⁵ *Devco* at para. 23 and para. 19 citing Cromwell, J.A. in *MacPhail* at para. 20.

¹⁶ *Devco* at para. 18.

¹⁷ *Devco* at para. 20.

¹⁸ *Devco* at para. 7.

¹⁹ *Workers' Compensation Act*, S.N.S. 1994-1995, c. 10, s. 1A.

[26] In my view, these points do not serve to distinguish the ratio in *Devco*. The critical element of that case was the nature of the workers' compensation scheme and the historic trade-off entitling injured workers to immediate benefit payments. It was observed that benefits paid to workers came from the contributions of thousands of employers who paid into a general fund administered by the Board. Benefits not paid have an obvious impact on an injured worker and their family. By contrast, an inability to recover benefits paid was a loss shared by many employers. The Board's overpayment recovery policy demonstrated "the risk of losing an overpayment in certain circumstances is to be expected" and "certainly not viewed as constituting irreparable harm".²⁰ I find there has been no material change in the Board's recovery policy since the decision in *Devco*.²¹ In my view, *Devco* remains persuasive and binding authority.

[27] The Board also argues its partial payment to Ms. O'Brien is consistent with the historic trade-off in *Devco* and is an appropriate balancing of the conflicting interests and unique circumstances in this case. However, this position fails to account for several things. The first is that *Devco* didn't involve a partial payment. To the contrary, the facts in that case involved a retroactive payment of more than \$80,000, together with ongoing monthly payments of \$1,500 each month. The risk of non-repayment of those benefits was not enough to constitute irreparable harm.

[28] Second, the Board position fails to address the fact that the issue is more than monetary. A stay of the decision under appeal impacts Ms. O'Brien's entitlement to a range of benefits including medical aid benefits. The Board says Ms. O'Brien has not requested any of these benefits. Ms. O'Brien says the Board has not offered to assess her for medical aid. Instead, it has been litigating her entitlement to benefits since 2019. She has not had the benefit of being assessed or having access to medical support despite being symptomatic on an ongoing basis since 2015.

[29] Lastly, Ms. O'Brien points out the statutory scheme does not provide for stays pending appeal nor grant authority to a Hearing Officer or to WCAT to grant a stay. Board policy specifically provides "an appeal to a Hearing Officer does not operate as a stay of proceedings in respect of the decision that is being appealed".²² As the worker argues in her written submission:

²⁰ *Devco* at para. 23.

²¹ Workers' Compensation Board Policy Number: 10.2.1R1.

²² Workers' Compensation Board Policy 8.1.3 R3.

The effect is that benefits will be paid or ended (as the case may be) until the appeal is concluded by a decision being rendered. There is thus an acceptance of risk in the applicable law itself that the Board may not be paid back if the claim is ultimately denied on appeal. Neither the Act, nor WCB Policy considers this a risk of irreparable harm.

[30] Ms. O'Brien's position on this point is consistent with the analysis in *Devco* and its contextual approach to the issue of irreparable harm. I am not persuaded there is any meaningful distinction between *Devco* and the present case. Neither am I satisfied the Board has established irreparable harm flows from the requirement to pay Ms. O'Brien the benefits she is presently entitled to receive.²³

Balance of Convenience

[31] Since I am not persuaded that irreparable harm is proven, I need not consider the balance of convenience.

[32] However, I am satisfied the balance of convenience favours Ms. O'Brien. WCAT has found (after two tribunal appeals) that she has a recurrence of her 2015 compensable injury. She has been entirely unable to work since June 12, 2019, and has had no employment income as a result. In that lengthy period, she has not received benefits beyond the recent partial payment. She has not been assessed for medical aid. The workers' compensation system is intended to support injured workers with immediate benefits and rehabilitation support if they are found entitled.

[33] For the balance of convenience to favour the Board, it must establish that it will suffer more in the absence of a stay than Ms. O'Brien will if her benefits are stayed. It is evident from the Board's position that its concern is a financial one. The everyday business of the Board is to administer the system of benefits and seek recovery of overpayments consistent with the *Act* and its policies. In my view, the balance of convenience in this case clearly favours Ms. O'Brien.

²³ On this point I note Ms. O'Brien's argument that the Board calculations are wrong and do not properly account for her receipt of Canada Pension Plan Disability benefits. It is not necessary to resolve this issue to dispose of the motion.

Conclusion

[34] The Board has failed to satisfy the primary test. It did not argue any exceptional circumstances require a stay. As a result, the motion to stay the decision under appeal is dismissed.

[35] There shall be no order for costs.

Gogan, J.A.