COURT OF APPEAL FOR ONTARIO

CITATION: Alliance to Protect Prince Edward County v. Ontario (Environment and Climate Change), 2018 ONCA 576
DATE: 20180622
DOCKET: M49284 and M49286

Lauwers J.A. (Motion Judge)

BETWEEN

Alliance to Protect Prince Edward County

Applicant/Appellant

and

The Ministry of the Environment and Climate Change
and WPD White Pines Wind Incorporated

Respondents

Eric K. Gillespie, for the applicant/appellant

Jon Bradbury, for the respondent Ministry of the Environment and Climate Change

Patrick G. Duffy, for the respondent WPD White Pines Wind Incorporated

Heard: June 20, 2018

REASONS FOR DECISION

[1] The applicant moves for an order staying the operation of Renewable Energy Approval No. 2344-9 R6RWR ("REA"), pending this court's decision on whether to grant leave to appeal from the order of Conway J., dated May 23, 2018.

A. THE FACTUAL CONTEXT

[2] WPD White Pines Wind Incorporated ("WPD") has approval from the Ministry of the Environment and Climate Change to construct certain wind turbines in Prince Edward County. The approval provides, at s. L1(1), that WPD "shall avoid all Blanding's Turtle overwintering habitat, during the overwintering period of October 15 to April 15." The approval goes on to say, at s. L1(3):

> Where possible, construction and maintenance activities including vegetation clearing, road construction and site preparation for project components located within Blanding's Turtle habitat shall only occur between October 15 and April 30.
>
> > (a) If construction and maintenance activities between May 1 and October 14 are unavoidable, every attempt must be made to avoid harassment or injury to Blanding's Turtles.

[3] There is a factual dispute about whether construction is occurring in relation to all nine approved wind turbines or only one, and whether Blanding's Turtle habitat is affected. In a letter dated November 15, 2017, the director of the Environmental Approvals Access and Service Integration Branch of the Ministry of the Environment and Climate Change stated:

> As of October 15, 2017, construction is proceeding throughout the site. The Proponent [WPD] has proposed a construction schedule that will complete all construction in Blanding's Turtle habitat between October 15, 2017 and April 30, 2018 with the exception of the erection of one turbine, of which the Proponent has successfully proven to the [M]inistry is unavoidable.

> Construction for the project is proceeding in phases. The [M]inistry's local district office continues to conduct site visits and is in regular contact with the [P]roponent to discuss all aspects of the project and to ensure that both the requirements of the REA [Renewable Energy Approval] and commitments made by the company are being met. [Emphasis added.]

[4] Based on this, the applicant sought judicial review of the above "decision", asserting that this letter demonstrates the Ministry's continued supervision.

B. THE ORDER UNDER CHALLENGE

[5] The proceeding before Conway J. consisted of a stay motion by the applicant, pending its application for judicial review, and a cross-motion by WPD, which was supported by the Ministry of the Environment and Climate Change. Justice Conway was sitting as a single judge of the Divisional Court hearing the matter as one of urgency, although not under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[6] The applicant sought a stay of the operation of the Ministry's approval on the ground that proceeding with the construction after April 30, 2018 violated the terms of the REA. The notice of motion asserted that a motion was originally brought on April 27, 2018 to stay the construction activities, but it was allegedly settled "on the understanding that construction was only to continue at one turbine site after May 1, 2018." However, construction was continuing at multiple turbine sites.

[7] The cross-motion by the respondents before Conway J. was for an order "dismissing the [underlying] application for judicial review … for lack of jurisdiction under the *Judicial Review Procedure Act*".

[8] Justice Conway dismissed the applicant's motion for a stay and granted the WPD motion to dismiss the judicial review application "as the underlying basis for it cannot be established". She gave two reasons for these decisions:

> First, I do not consider that any "decision" reflected in the Nov. 15/17 letter is a "statutory power of decision" subject to judicial review under the [*Judicial Review Procedure Act*]. The Director issued the REA that stipulated the conditions to be followed by WPD in constructing turbines and mitigating and protecting the impact on the Blanding's [T]urtle, both in delineating their habitat areas and dealing with access roads. That decision was reviewed and amended by the [Environmental Review] Tribunal. An appeal from the ERT was not pursued. The Ministry's letter of Nov. 15 deals with construction at one site being unavoidable. There was no requirement in the REA for WPD to seek the M[inistry]'s approval in this respect before continuing with construction and I fail to see how that can be regarded as a statutory power of decision. (I note that there is no direct communication with WPD and the Ministry or application by WPD that might support APPEC's [the applicant's] decision).
>
> With respect to the alleged "decision" regarding the boundaries of the habitat, the letter incorporates the Report that is [referenced] in the REA. The "decision [with respect to] the boundaries of the habitat are the subject of the REA, not the Ministry's call. I regard the Ministry as implementing the decisions made in the REA and not making decisions that are subject to judicial review.
>
> Second, in my view, the APPEC is seeking to challenge the REA and the determination of what the appropriate

> boundaries of the habitat are and what protective measures are to be taken to preserve the Blanding's [T]urtle. The [judicial review] application is a disguised attempt to rewrite these boundaries and conditions. The process and appeal routes for challenging those issues is well-defined. [Emphasis in original.]

C. THE JURISDICTIONAL QUESTION

[9] The motion for a stay in this court raises a jurisdictional question arising from the interpretation of s.21 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides:

> (3) A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court.
>
> …
>
> (5) A panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion.

[10] The jurisdictional issue is whether the decision of Conway J. can only be reviewed under s. 21(5) of the *Courts of Justice Act* or whether, because she dismissed the application for judicial review, an appeal lies to this court with leave under s. 6(1)(a) of the *Courts of Justice Act*.

[11] In *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 (C.A.), a single judge of the Divisional Court dismissed a motion to restore an abandoned appeal to the list. Associate Chief Justice Morden said, in an oral

judgment, that he considered the order to have been an interlocutory motion within the proceeding, and then laid out the correct approach:

> [I]n our view, the matter is squarely covered by s. 16(3)(b) [the equivalent to s. 21(5)]. The order in question is a decision of a judge of the Divisional Court made on a motion in that court and, as such, is reviewable by a panel of that court on a motion to set aside or vary. In the context of s. 16(3)(b) we think that by the use of "set aside or vary" it was intended to give the panel all of the powers of the single judge with respect to the proper disposition of the motion.

[12] He added that the “most sensible interpretation” was that the terms in s. 21(5) should “take precedence over and exclude the general terms of” the appeal right in s. 6(1)(a).

[13] I am not only bound by this analysis, but I agree with it. In short, the structure of the legislation requires a person to exhaust the remedial jurisdiction of the Divisional Court before coming to the Court of Appeal. This is an eminently reasonable division of labour between the two courts. Nothing in the legislation or the jurisprudence supports the approach the applicant takes here.

[14] I am fortified in my view by the wording of s. 6 of the *Judicial Review Procedure Act*. It was open to the applicant under s. 6(2) to apply to a judge of the Superior Court for judicial review with leave of a judge of that court, “where it is made to appear to the judge that the case is one of urgency and that the delay required for an application in the Divisional Court is likely to involve a failure of justice.” Although Conway J. treated this application as a matter of urgency, it was

not brought under s. 6(2). Notably, had it been so brought, then under s. 6(4), an appeal would lie directly to the Court of Appeal with leave, and there is no prospect of a review by a panel of the Divisional Court. Given the contrast between the wording of the *Courts of Justice Act* and the *Judicial Review Procedure Act*, I assume the difference in treatment was legislatively intended.

[15] Counsel for the applicant submits that *Overseas Mission* is distinguishable, because it did not consider whether the panel review process in s, 21(5) should apply to a final order. I would not give effect to this argument. The subsection does not distinguish between interlocutory and final orders, nor is it necessary to do so to arrive at a sensible interpretation of the provision.

[16] Counsel relies on the chambers decision of Blair J.A. in another case about Blanding's Turtles and suggests that I take a similar approach. In *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.*, 2014 ONCA 227, 119 O.R. (3d) 704, the applicant sought a stay of the Divisional Court's reinstatement of the Minister's approval of a wind energy project, pending the disposition of the applicant's motion for leave to appeal. This court ultimately granted leave and allowed the appeal in part: 2015 ONCA 269, 332 O.A.C. 374.

[17] Justice Blair granted the stay after considering the customary criteria, which he listed at para 12: the moving party must show that (a) there is a serious issue for consideration on appeal; (b) it will suffer irreparable harm if a stay is not granted;

and (c) the balance of convenience favours such an order. See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[18] While Blair J.A.'s decision contains some discussion about Blanding's Turtles upon which the appellant wishes to draw, the important jurisdictional point is that there was a judicial decision capable of being stayed because there was a Divisional Court order on the merits of the appeal. That is not the case here.

[19] I make two additional comments. First, the applicant is before this court in part because it believes that the Divisional Court is incapable of constituting a review panel urgently, and the construction is proceeding every day. If it is required to wait until September, then the construction will be completed, and the review will be moot. I accept that the urgency exists, but urgency does not give this court jurisdiction. I am confident that the Divisional Court can respond with alacrity in these circumstances.

[20] Second, counsel for the applicant expresses the concern that any motion for interim relief to prevent further construction while the review is pending will be resisted by the respondent on the basis that it is res judicata. Counsel for WPD agreed he would make that argument. He submits that this continued litigation is the appellant's effort to press claims already addressed in the proceedings before the Environmental Review Tribunal.

[21] I do not see a motion for interim relief pending the panel review to be the same beast as the motion before Conway J., regardless of how frustrated the respondent might be at having to make similar arguments again.

D. DISPOSITION

[22] The motion for a stay is quashed with costs payable by the appellant to WPD in the amount of $3,000, inclusive of taxes and disbursements.

"P. Lauwers J.A."