COURT OF APPEAL FOR ONTARIO

CITATION: Haudenosaunee Development Institute v. Metrolinx, 2023 ONCA 122
DATE: 20230222
DOCKET: M54074 (COA-23-OM-0047)

Sossin J.A. (Motion Judge)

BETWEEN

Haudenosaunee Development Institute

Applicant/Moving Party
(Moving Party)

and

Metrolinx

Respondent/Responding Party
(Responding Party)

Tim Gilbert, Zarya Cynader, Colin Carruthers, Thomas Dumigan, Jack MacDonald and Jonathan Martin for the moving party

Sarit Batner, Bryn Gray, Sam Rogers, Bonnie Greenaway and Chris Puskas for the responding party

Heard: February 22, 2023 by video conference

ENDORSEMENT

OVERVIEW

[1] On February 21, 2023, the Divisional Court denied the Haudenosaunee Development Institute (HDI)'s motion for leave to appeal an order of Hackland J. dated February 10, 2023 (with reasons reported at 2023 ONSC 1170), which

denied an injunction against Metrolinx to prevent the removal of 11 trees on Metrolinx property located next to Osgoode Hall.

[2] The moving party, HDI, now seeks to extend interim relief ordered on February 17, 2023 by Corbett J. of the Divisional Court, which was ordered pending the outcome of the Divisional Court leave to appeal motion, and expired at 11:59 p.m. on February 21, 2023, following the Divisional Court's decision. As the injunction has expired, I will treat this as a fresh motion for interim relief. The substantive issues are the same whether framed as an extension or a fresh interim injunction.

[3] Specifically, HDI seeks to continue an interim injunction preventing Metrolinx from taking any further actions on the Osgoode Hall site, including the cutting of trees, until this court disposes of its motion for leave to appeal from the order of the Divisional Court denying leave.

[4] Metrolinx opposes this motion for a further interim injunction. Metrolinx argues that HDI has had its day in court and was unsuccessful. It should not be permitted to further delay Metrolinx from undertaking lawful work on its property as HDI satisfies none of the criteria for an injunction, and additionally has not met the requirement of providing an undertaking for damages. Specifically, Metrolinx argues that there is no serious issue to be heard as appeals to the Court of Appeal

are not available from the denial of a leave to appeal from the Divisional Court in these circumstances.

[5] The test for an interlocutory injunction is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 348. The moving party must demonstrate that:

a. there is a serious issue to be tried;

b. irreparable harm will result if the relief is not granted; and

c. the balance of convenience favours the moving party.

[6] While strength in one part of the *RJR-MacDonald* test can make up for a weakness in another, an injunction will not be issued where a prong of the test is not met.

[7] In this case, the requirement of a serious issue is not met.

[8] Generally, a party may seek leave to appeal a decision of the Divisional Court pursuant to s. 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. As a rule, however, there is no ability to appeal from an order of an intermediate court refusing leave to appeal, unless the judge of that court "mistakenly declined jurisdiction": *Halton (Regional Municipality) v. F. Greco & Sons Limited (Greco Construction)*, 2021 ONCA 446, at para. 4; *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* (1996), 29 O.R. (3d)

612 (C.A.), at pp. 624-25; and *Denison Mines Limited v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (C.A.), at paras. 4-5, 8.

[9] HDI argues that this is an exceptional case which justifies this court considering a motion for leave to appeal from the denial of leave to appeal by the Divisional Court. HDI argues that this case requires an exceptional avenue of redress given the alleged denial of sufficient "engagement" with HDI within the meaning of that term given by the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 64. As HDI states in its factum: "redress must be available where the judge below has disregarded the sacred and constitutionally-protected treaty rights of an indigenous litigant."

[10] The exception recognized by this court to the general rule against hearing appeals from leave to appeal decisions at the Divisional Court, however, is a narrow one: *Hillmond Investments Ltd.*, at p. 625. It includes both issues of jurisdiction and disregard of some essential statutory right such as procedural breaches (the example given is a decision reached on submissions from one party without hearing from the other). It does not extend to considering the merits of leave to appeal motions, no matter how important the subject matter of those merits may be.

[11] In this case, the jurisdictional question has already been decided by a panel of this court on February 17, 2023, which concluded that an appeal from the order of Hackland J. at issue lay to the Divisional Court, with leave. Therefore, it cannot be said that the Divisional Court "mistakenly declined jurisdiction" when it denied HDI's motion for leave to appeal.

[12] HDI nevertheless argues the exception to the general rule against hearing an appeal from the Divisional Court's leave to appeal decision applies because its rights to consultation are procedural in nature, and all the more significant given the constitutional context.

[13] Metrolinx submits that as HDI has raised no issue going to the jurisdiction or denial of rights in the leave to appeal decision, it does not meet the narrow exception.

[14] I agree the exception does not apply. HDI alleges significant breaches to constitutionally required consultation. The narrow exception where leave to appeal is sought from a denial of leave to appeal, however, does not relate to a denial of fairness or breach of constitutional rights as between the parties. Rather, it deals with procedural errors by the court granting or denying leave to appeal (as in the scenario of decisions in chambers after hearing from one side but not the other mentioned in Hillmond, at p. 625). HDI has not raised this kind of procedural flaw

in the decision-making of the Divisional Court. Therefore, this case does not fit within the narrow exception.

[15] As leave to appeal to this court would appear not to be available from the Divisional Court's denial of leave to appeal in these circumstances for the reasons set out above, the motion for an interim injunction pending consideration by this court of such a leave motion cannot meet the threshold of a serious issue.

[16] As the serious issue prong of the test has not been met, it is not necessary for me to deal with the questions of irreparable harm or the balance of convenience.

[17] Therefore, the motion for an interim injunction is dismissed.

[18] I make no order as to costs of this motion.

"L. Sossin J.A."