COURT OF APPEAL FOR ONTARIO

CITATION: Haudenosaunee Development Institute v. Metrolinx, 2023 ONCA 144
DATE: 20230301
DOCKET: M54052, M54053 & M54054
(COA-23-CV-0139)

MacPherson, van Rensburg and Benotto JJ.A.

BETWEEN

Haudenosaunee Development Institute

Applicant/Moving Party
(Appellant/Moving Party/Responding Party)

and

Metrolinx

Respondent/Responding Party
(Respondent/Responding Party/Moving Party)

Tim Gilbert, Colin Carruthers, Thomas Dumigan, Jack MacDonald, Jonathan Martin, and Zarya Cynader, for the appellant/moving party (M54052) and the appellant/responding party (M54053/M54054)

Sarit Batner, Bryn Gray, Sam Rogers, Bonnie Greenaway, and Chris Puskas, for the respondent/responding party (M54052) and the respondent/moving party (M54053/M54054)

Heard: February 14 and 17, 2023

On appeal from the order of Justice Charles T. Hackland of the Superior Court of Justice, dated February 16, 2023, with reasons reported at 2023 ONSC 1170.

By the Court:

A. OVERVIEW

[1] The respondent Metrolinx brought a motion to quash the appeal of the appellant Haudenosaunee Development Institute ("HDI") from an order of a judge of the Superior Court of Justice dated February 10, 2023, dismissing its motion for an interlocutory injunction. Metrolinx also brought a motion seeking an order pursuant to s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"), setting aside the order of Gillese J.A. of this court dated February 11, 2023. In that order, on a motion brought by HDI, Gillese J.A. granted an interim injunction that, *inter alia*, enjoined Metrolinx from cutting down any trees on the Osgoode Hall property in downtown Toronto pending the disposition of HDI's motion. Gillese J.A. then adjourned the motion to February 14 at 10:00 a.m. On February 14, Metrolinx also raised as a preliminary matter an allegation of reasonable apprehension of institutional bias, seeking to disqualify the panel or any judge of this court from hearing any matter related to HDI's appeal, including the pending motions. HDI, in turn, brought a motion for an extension of the Gillese J.A. interim injunction pending its appeal, or, in the event that jurisdiction lay with the Divisional Court, pending a motion for leave to appeal to that court.

[2] We heard argument related to these matters on February 14 and 17. On February 14, we dismissed Metrolinx's reasonable apprehension of bias challenge, with reasons to follow. At the conclusion of the hearing on February 17, we granted the motion to quash with reasons to follow. These are our reasons on

these two issues. As we will explain, while we extended the injunction for a few days, it was ultimately unnecessary for us to determine HDI's interlocutory injunction motion.

B. FACTS

(1) The parties and events

[3] Metrolinx is a Crown agency. It has been tasked with building a number of new public transportation projects. One of its projects is the Ontario Line, a new 15.6 kilometer subway line in Toronto. The new line will run from Exhibition Place to the Ontario Science Centre and is planned to include 15 new stations.

[4] One of the proposed new subway stations is the expanded Osgoode Station. Metrolinx proposes to locate one of the entrances for this station on the southwest corner of the lawn at Osgoode Hall, a large and historic (almost two centuries old) building at the corner where Queen Street and University Avenue intersect.

[5] The land proposed for the Osgoode Station was owned by the Law Society of Ontario ("LSO"). The building on the site is the exclusive home of the LSO and the Court of Appeal for Ontario and one of the homes of the Superior Court of Justice.

[6] The land proposed for the Osgoode Station was expropriated from the LSO. Metrolinx is now the sole owner of the land.

[7] Metrolinx proposes to remove 11 mature (between 50 and 100 years old) trees from the site.

[8] HDI is an organization formed by the Haudenosaunee Confederacy Chiefs Council ("HCCC") in 2006. HDI was created to facilitate engagement between the HCCC, governments, and land developers on land matters affecting Haudenosaunee rights and interests.

[9] There has been engagement between HDI and Metrolinx with respect to the proposed Osgoode Station. HDI has worked out several agreements with Metrolinx to facilitate its engagement in the Ontario Line Project. However, the engagement has not led to any kind of agreement concerning the Osgoode Station.

(2) The litigation

[10] When the LSO learned that Metrolinx proposed to cut down the 11 trees on the Osgoode Hall property on the February 4-5 weekend, it brought an injunction motion on February 3. HDI commenced its own application and brought a motion for an interim injunction on February 8. HDI's motion for an interim injunction was heard with the LSO's motion. Justice Hackland of the Superior Court of Justice dismissed both motions on Friday, February 10, 2023, with written reasons to follow. Justice Hackland released full reasons for each motion on Thursday, February 16, 2023. His reasons relating to the LSO motion can be found at *Law Society of Ontario v. Metrolinx*, 2023 ONSC 1169.

[11] Early on Saturday, February 11, at 1:12 a.m., HDI emailed a Notice of Appeal from Hackland J.'s order to this court. HDI copied its Notice of Appeal to five of the counsel representing Metrolinx. HDI also brought a motion seeking an interim injunction pending appeal.

[12] The Court of Appeal acknowledged receipt of the Notice of Appeal at 7:29 a.m.

[13] Metrolinx began cutting the trees early on the morning of February 11. The cutting removed three trees entirely, removed all the limbs on two other trees, and seriously trimmed four others. Only two trees were not touched.

[14] After a case management meeting at 10:15 a.m. that morning, the cutting ceased until HDI's emergency motion came before Gillese J.A. at 2:00 p.m. At the conclusion of the Saturday afternoon hearing, Gillese J.A. ordered:

> This motion is adjourned to Tuesday, February 14, 2023, at 10:00 am, to be heard in person. The adjournment is ordered to enable the moving party [HDI] to file a reply factum addressing the issue raised by the responding party [Metrolinx], namely, whether this court has jurisdiction to hear and decide the motion. The responding party is enjoined from taking any steps in relation to the trees that are the subject matter of the motion, except as necessary to preserve and protect them from damage pending the disposition of the motion.

[15] Both parties filed material, including factums. This panel heard submissions over two days, February 14 and 17.

C. ISSUES

[16] These reasons address the two preliminary issues raised by Metrolinx, which are as follows:

1. Is the Court of Appeal for Ontario, and are all the judges on that court, precluded from hearing the motions and the underlying appeal because of a reasonable apprehension of 'institutional bias'?
2. Does this court lack jurisdiction to hear this appeal because Hackland J.'s order is an interlocutory, not a final, order and, therefore, any appeal must be heard and determined by the Divisional Court with leave?

D. ANALYSIS

(1) The institutional bias issue

[17] Metrolinx raised this issue in an unusual fashion. It did not bring a motion with supporting material. Instead, it raised the issue in a letter from its lead counsel to the Executive Legal Officer of this court on February 12, two days before the scheduled hearing.

[18] The letter identified its subject matter as *Re: Composition of Court in COA-23-CV-0139 and Motion under r. 61.16(6)*. The relief sought by Metrolinx is stated in paragraph 4 of the letter:

> Metrolinx respectfully requests that the Court designate judges of the Superior Court of Justice from outside Toronto as *ad hoc* judges of the Court of Appeal,

> pursuant to section 4(1) of the *Courts of Justice Act* ("*CJA*"), to hear all proceedings related to HDI's motion and appeal.

[19] In oral argument, Metrolinx underscored that it was not asserting *individual* bias on the part of any judge or judges on this court. Metrolinx also emphasized that there is no allegation of *actual* bias. Rather, Metrolinx asserted that there was a reasonable apprehension of institutional bias – that is, that the Court of Appeal for Ontario as an institution would not be able to fairly determine any issue in relation to the Osgoode Hall station, and in particular the removal of trees from the Osgoode Hall property.

[20] In support of this position, Metrolinx referred to a letter dated December 5, 2022 from Associate Chief Justice Fairburn of this court to the Attorney General of Ontario. In the letter, the Associate Chief Justice indicates that she is speaking on behalf of the Court of Appeal and that Chief Justice Morawetz of the Superior Court of Justice shares the views she expresses.

[21] The gist of the Associate Chief Justice's letter – to the Attorney General, not Metrolinx, we emphasize – is that both the Court of Appeal and the Superior Court of Justice have a concern about "the structural integrity of Osgoode Hall", "the safety of the occupants of Osgoode Hall and those who attend at Osgoode Hall" and whether "justice can be accessed and delivered from Osgoode Hall if this project proceeds as contemplated." The word "trees" is not mentioned in the letter.

[22] The test for reasonable apprehension of bias was stated almost 50 years ago by de Grandpré J. (dissenting, but not on this point) in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> … what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

See also: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 20.

[23] There is a presumption of judicial impartiality. As expressed by McLachlin C.J. in *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357, at para. 22:

> The basic framework for assessing a claim that the judge failed to decide the case independently and impartially may be summarized as follows. The claim is procedural, focussing on whether the litigant's right to an impartial and independent trial of the issues has been violated. There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.

[24] In our view, Metrolinx's position is far removed from meeting this stringent standard. Most judges, including appeal court judges, focus entirely on their adjudicative role. A small number, especially chief justices and associate chief

justices, have a second, and different, role – administering the court. In this latter role, these judges must communicate and interact with many external constituencies – governments (especially attorneys general), professional organizations like the Canadian Bar Association and the LSO, smaller legal organizations that represent particular groups of the legal profession, the media, law schools, and many others. All of these relationships, contacts and communications are administrative tasks, not adjudicative.

[25] It follows that the "informed person, viewing the matter realistically and practically – and having thought the matter through" would conclude that the Associate Chief Justice's letter to the Attorney General would not give rise to any concern about the court's independence and impartiality. The letter does not raise any spectre of judicial bias.

[26] Metrolinx's argument is, in effect, that the letter casts a shadow over the independence of the entire Court of Appeal with respect to this litigation. In other words, the letter creates a reasonable apprehension of bias that precludes *all* judges of the court from hearing the motions and appeal. Hence Metrolinx posits the remedy of designating three judges of the Superior Court of Justice from outside Toronto as *ad hoc* judges of the Court of Appeal to hear all proceedings relating to the motions and appeal.

[27] We did not give effect to this argument. It is misconceived and misunderstands the role of the Ontario judiciary, which is, always, to hear and determine motions and appeals fairly and impartially. Concerns about the practicalities of administering court hearings amidst an ongoing construction project do not cast any aspersions on the court's ability to perform its adjudicative role.

(2) The interlocutory v. final order issue

[28] Metrolinx moved to quash the appeal of the order of Hackland J. on the basis that this court lacked jurisdiction over the appeal. The issue to be determined was whether the order is final, in which case this court would have jurisdiction under s. 6(1)(b) of the *CJA*, or whether it is interlocutory, in which case an appeal would lie to the Divisional Court, with leave under s. 19(1)(b).

[29] Metrolinx argued that the order under appeal is interlocutory. In support of that argument, Metrolinx pointed out that the order was made on a motion for an interlocutory injunction under s. 101 of the *CJA* in the context of an application in which HDI sought other relief, including declarations of its rights. Although Hackland J. determined on a final basis that HDI was not entitled to an injunction, Metrolinx asserted that he did not determine any substantive issue in the proceedings.

[30] HDI submitted that the order under appeal determined the real matter in dispute between the parties, which was the cutting of trees at Osgoode Hall. HDI argued that Hackland J.'s order dismissing its interlocutory injunction motion determined that issue on a final basis and that, accordingly, the order was final. It was HDI's contention that the effect of the order was that the substratum of its application disappeared. Indeed, in this court, HDI indicated that it would discontinue the underlying application if its motion for an interim injunction were not granted.

[31] After hearing argument on February 14, we adjourned the matter pending receipt of the order under appeal and Hackland J.'s reasons. We heard brief submissions on the terms of the adjournment, and we directed that the order of Gillese J.A. remain in place pending our determination of the jurisdiction issue.

[32] The order and reasons of Hackland J. were provided to the court on February 16, and we were able to reconvene the following day. After hearing the parties' further submissions on the effect of the order and the reasons, we concluded that the order under appeal is interlocutory. Accordingly, we quashed HDI's appeal to this court with reasons to follow.

[33] In *Paulpillai Estate v. Yusuf*, 2020 ONCA 655, at para. 16, this court summarized the principles that inform the determination of whether an order of the Superior Court is final or interlocutory for purposes of the *CJA* appeal routes. An

interlocutory order is an order which "does not determine the real matter in dispute between the parties – the very subject matter of the litigation – or any substantive right": *Paulpillai Estate*, at para 16, citing *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2020 ONCA 375, at para. 16, and *Hendrickson v. Kallio*, [1932] O.R. 675, at p. 678. See also *Ball v. Donais* (1993), 13 O.R. (3d) 322 (C.A.). As Middleton J.A. observed in *Hendrickson*, at p. 678, an order "may be final in the sense that it determines the very question raised by the [motion or application before the court] but it is interlocutory if the merits of the case remain to be determined."

[34] In determining whether an order under appeal is final or interlocutory, "one must examine the terms of the order, the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order": *Paulpillai Estate*, at para. 16, citing *Prescott & Russell (United Counties) v. David S. Laflamme Construction Inc.*, 2018 ONCA 495, 142 O.R. (3d) 317, at para. 7.

[35] The starting point for our analysis is HDI's Notice of Application, which provides the framework of the litigation it commenced. The Notice of Application claims a number of declarations, including that the Haudenosaunee have treaty rights over the Osgoode Hall site, that the Ontario Line Project will infringe those rights, that Metrolinx owes a duty to engage with the Haudenosaunee and the HCCC in respect of the Project, and that Metrolinx has not adequately engaged.

The Notice of Application also requests an injunction preventing Metrolinx from taking any further actions on the Osgoode Hall site until it adequately engages with HDI.

[36] Although HDI submitted that the claims were just to provide a foundation or cause of action in which to claim an injunction, the Notice of Application reveals that the issues in the Application concern more than the requested injunction. Much of the Application turns on a determination of the scope of Haudenosaunee treaty rights and HDI's claim that Metrolinx owes a duty of engagement. Contrary to HDI's submissions, there is nothing in the Notice of Application to suggest that the subject matter of the application was limited to the trees at Osgoode Hall.

[37] Nor does the fact that the Application claims an injunction mean that the order made by Hackland J. is a final order. While orders made under s. 101 of the *CJA* have been characterized as final when made in applications (see e.g., *Soberman Isenbaum Colomby Tessis Inc. v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (C.A.), and *Ontario v. Shehrazad Non-Profit Holding Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81), in this case, the order under appeal was made in the context of a motion. In its Amended Notice of Motion, HDI sought "injunctive relief on an interim and/or interlocutory basis preventing … Metrolinx, from taking any further actions on the Osgoode Hall site … until [HDI's] application [was] heard and decided". The motion did not seek the same injunctive relief that was sought in the Application (an injunction that would extend until Metrolinx adequately

engaged), and there is nothing in the Amended Notice of Motion to suggest that HDI was seeking a final determination of any issue when it brought its motion.

[38] Similarly, there is nothing in the order itself to suggest that any issue in the application proceeding was determined on a final basis. The order simply dismissed the motion for an interlocutory injunction.

[39] We also considered the reasons of Hackland J. for any indication that he determined any issue in the Application on a final basis. In our view, he did not. Justice Hackland's reasons make it clear that he was only determining HDI's request for an interlocutory injunction to prevent the removal of trees. He concluded that there was no irreparable harm to HDI connected with the tree removal and that the balance of convenience favoured Metrolinx. In the course of his reasons, he noted that HDI was seeking declaratory relief as to the scope of its rights and to consultation or engagement, but that "these issues [were] not being decided on [the] injunction motion": at para. 18. He also noted that whether HDI had "the right to consent or decline to consent to the removal of trees and to be entitled to receive compensation … may be addressed when the claims herein for declaratory relief are heard": at para. 21.

[40] Finally, we considered HDI's argument that the practical effect of the order refusing an injunction to prevent the trees from being cut down was to bring an end to the litigation. We do not accept this argument in light of the affidavit evidence.

The affidavits refer to a history of communications between the parties with respect to the Ontario Line Project and the Osgoode Hall site and unresolved issues that extend beyond the immediate concern respecting the trees at the Osgoode Hall site. In any event, even if the practical effect of the order is, as HDI indicates, that the litigation will come to an end, this does not make the order a final order: see e.g., *Amphenol Canada Corp. v. Sundaram*, 2019 ONCA 932, 56 C.P.C. (8th) 307, at paras. 23-24; *Ontario Medical Association et al. v. Miller* (1976), 14 O.R. (2d) 468 (C.A.), at p. 470; *Deltro Group Ltd. v. Potentia Renewables Inc.*, 2017 ONCA 784, 139 O.R. (3d) 239, at para. 3.

[41] In conclusion on this issue, we found that the order dismissing HDI's motion is interlocutory in nature and therefore, the appeal was not within the jurisdiction of this court. The order was made in the context of HDI's motion for interlocutory injunctive relief. Although the order determined the fate of the trees at Osgoode Hall on a final basis (in view of Metrolinx's determination to proceed with the removal of the trees as part of its work on the Ontario Line Project), it did not determine the "real matter in dispute between the parties", which was the Haudenosaunee treaty rights and their claim to a duty of engagement. As such, we quashed the appeal to this court.

[42] On February 16, Metrolinx advised that if we concluded that the order under appeal was interlocutory, it would take no further steps in relation to the trees at Osgoode Hall until the matter was before the Divisional Court, where the parties

had provisionally arranged an appointment the afternoon of February 17. Accordingly, it was unnecessary to address HDI's request for further interim relief.

E. DISPOSITION

[43] For these reasons, we quashed the appeal. In accordance with the agreement of counsel, costs of $25,000 all inclusive will be paid by HDI.

Released: March 1, 2023 "J.C.M."

"J.C. MacPherson J.A."
"K. van Rensburg J.A."
"M.L. Benotto J.A."