

CITATION: Law Society of Ontario v. Metrolinx, 2023 ONSC Number
COURT FILE NO.: CV-23-00694198-0000
DATE: 20230205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: LAW SOCIETY OF ONTARIO

AND:

METROLINX

BEFORE: Justice Chalmers

COUNSEL: *L. Rothstein, M. Fenrick*, for the Applicant/Moving Party
S. Batner, B. Shaw, S. Rogers, for the Respondent/Responding Party

HEARD: February 4, 2023, by videoconference

ENDORSEMENT

Introduction

[1] The Law Society of Ontario (LSO) brings this motion on an urgent basis for an interim injunction restraining Metrolinx from removing mature trees that are located on the southwest corner of Queen Street and University Avenue in Toronto. The motion is brought on notice.

[2] For the reasons that follow, I grant the interim injunction. The injunction will be in effect until midnight February 10, 2023, unless extended by further order of this court.

Procedural Background

[3] On February 3, 2023, the LSO issued a Notice of Application before the City of Toronto's Council under section 33(1) of the *Ontario Heritage Act*. On the same day, the LSO brought a motion for an interim interlocutory injunction restraining Metrolinx from taking any further action on the Osgoode Hall site until the Application has been heard and decided.

[4] The Notice of Motion was received by the court shortly after 6:05 p.m. on February 3, 2023. With the Notice of Motion, was a request from counsel for the LSO to schedule an urgent case conference. Counsel advised that she would be available any time after 10 a.m. on February 4, 2023. The Court arranged the case conference for February 4, 2023, at 10 a.m.

[5] On the case conference, counsel for the LSO sought to schedule the injunction motion and to establish a timetable. Initially she did not seek interim injunctive relief. In the course of the case conference, it was learned that Metrolinx had started cutting down the trees early on February 4, 2023, with at least one tree being cut down by the time the case conference began. Counsel for LSO then sought an urgent hearing for interim relief.

[6] Following a brief adjournment of the case conference, counsel for LSO advised that her client has provided an undertaking as to damages. In light of the undertaking as to damages, counsel for Metrolinx was asked whether her client would consent to stand down until after the urgent motion could be heard in the afternoon of February 4, 2023. She advised that her client is prepared to stand down pending the hearing and disposition of the motion. The urgent motion proceeded at 2 pm February 4, 2023.

Factual Background

[7] I reviewed the evidence set out in Diana Miles' affidavit dated February 3, 2023. Ms. Miles is the Chief Executive Officer of the LSO. I also reviewed the affidavit of Michael Hodge, affirmed February 4, 2023. Mr. Hodge is the acting vice president for the Ontario Line Project.

[8] The LSO is a regulatory body that oversees the legal professions in Ontario. The LSO owns the East Wing of Osgoode Hall, and until recently also owned the south facing landscaped lawns abutting Queen Street and running west to University Avenue. Part of the lawn on the southwest corner of the grounds was expropriated by Metrolinx. The rest of the Osgoode site is owned by the Province of Ontario. The building at Osgoode Hall has been designated as a building of historical and architectural significance. The east wing and the gardens are designated as protected heritage sites under Part IV of the *Ontario Heritage Act*.

[9] Metrolinx is a Crown corporation. It is responsible for the construction of the new Ontario Subway Line that will run from Exhibition Place to the Ontario Science Centre. Metrolinx plans to locate a station for the Ontario Line on the northeast corner of Queen Street and University Avenue. This area is part of the landscaped lawns of Osgoode. The concept of using the Osgoode site as a subway station was considered in 2018 and 2019, along with ten different subway entrance locations. After considering a number of factors, including the impact the site would have on the environment and heritage, Metrolinx determined that the Osgoode site was the most suitable location.

[10] From 2020 to 2022, Metrolinx met with the LSO on multiple occasions to discuss the Osgoode site. The LSO maintained its opposition. On February 19, 2021, Metrolinx submitted a Request for Consent to build a station entrance at the Osgoode site. The Minister of Heritage, Sport, Tourism and Culture Industries provided consent on March 18, 2021. The consent acknowledges that there will be the permanent removal of mature trees at the southwest corner of the property. The LSO was aware of the Minister's approval in early 2021. No application for judicial review was brought by the LSO, with respect to the decision of the Minister.

[11] On November 23, 2021, Metrolinx applied to the Ministry of Transportation (MTO) for the expropriation of the land for the Osgoode station. The LSO opposed the expropriation. On January 6, 2022, the LSO sent an e-mail to MTO regarding its concerns, including the impacts to trees. On April 25, 2022, the MTO advised the LSO that it had investigated the concerns raised in its letter to the MTO and concluded that the proposed expropriation was necessary. Metrolinx sent the Notices of Expropriation to the LSO on August 16, 2022. On November 30, 2022, Metrolinx formally took possession of the land. LSO did not bring an application for judicial review of the expropriation decision.

[12] In October 2022, the City of Toronto engaged Parsons Corporation to perform a third-party review of the Osgoode Station site. The Parsons' report was to consider alternative sites. According to Ms. Miles she attended a meeting on November 28, 2022, at which time Metrolinx agreed to not take any action at the Osgoode site until after the Parsons report was released and considered by City Council and the community. Metrolinx denies that it agreed to wait for the Parsons report to be considered by City Council, or that it would not proceed with the work at the Osgoode site.

[13] A meeting of stakeholders was arranged for February 1, 2023. At that time, the findings and conclusions of the Parsons' report were shared with stakeholders including the LSO. The complete report was not published until the morning of February 4, 2023 (the day of the injunction hearing). The Parsons' report considered 10 potential sites for the Osgoode station and concluded that the Osgoode site is the most suitable option for the station. The Parsons' report also stated that one potentially feasible alternative site is the Campbell House site located on the southwest corner of Queen Street W. and University Avenue.

[14] Metrolinx had previously considered the Campbell House site and ruled it out. Campbell House is also a heritage site. According to Mr. Hodge, if the Campbell House site is used, the same trees at the Osgoode site would also have to be removed.

[15] On February 2, 2023, Metrolinx began preparatory work on the Osgoode Hall site. Security personnel and construction workers were on site. Steps were being taken to cut down trees located on the property expropriated by Metrolinx. As noted above, Metrolinx started removing the trees on the morning of Saturday, February 4, 2023. One tree was cut down.

[16] According to Mr. Hodge, the tree clearing was scheduled to take place over two weekends, February 4-5 and February 11-12, 2023. The work was scheduled for the weekend to minimize disruption at Osgoode Hall. A total of eleven trees are to be removed. Mr Hodge states that there is urgency to remove the trees to comply with construction schedules. In addition, the trees must be removed when there is no evidence of an active bird nest and therefore must be removed before April 1, 2023. Mr. Hodge states that if work is delayed and it misses the May 1, 2023 handover date to the contractor performing the rolling stock, systems operations and maintenance contractor, the liquidated damages claim are estimated to be \$1-2 million a day.

Discussion and Analysis

[17] The LSO seeks interim injunctive relief. The only issue before me today is whether to grant an interim injunction to restrain Metrolinx from cutting down trees until the motion for the injunction can be heard on February 10, 2023.

[18] The LSO seeks the interim relief to maintain the *status quo* until the injunction may be heard on a more complete record. The LSO states that it requires time to review the Parsons report, obtain a report from an expert on heritage status, and to conduct cross examinations, if necessary. The report from the heritage expert is expected by February 7, 2023. The LSO argues that it expected that there would be further discussions and consultations once the Parsons report was provided. When construction workers attended at the Osgoode Hall site before the Parsons report was provided, LSO moved quickly to bring this matter before the court. The LSO states that as a

result, the record is not as complete as it should be to allow the court to fully consider the issues. The LSO argues that if the mature trees located on the site are removed before the court can fully consider its motion for the injunction, there will be irreparable harm.

[19] Metrolinx opposes the relief sought. Its position is that the motion is not urgent. The plans to remove trees on the site has been known to the LSO for some time. Metrolinx argues that if LSO intended to obtain a report from a heritage expert it ought to have done so by now. It is also the position of Metrolinx that the LSO does not meet the test for an interlocutory injunction, and in particular, argues that there is no serious issue to be tried.

Test for Injunctive Relief

[20] The LSO seeks an interim interlocutory injunction to enjoin Metrolinx from removing the trees from the Osgoode site. The LSO asks that the injunctive relief be in effect for six days to allow the LSO to put a complete record before the court. An interlocutory injunction is extraordinary and equitable relief. Relief will not be granted, even for a brief period of time unless all three parts of the test for an injunction are met.

[21] Section 101 of the *Courts of Justice Act*, R.S.O. c. C.43, provides that an interlocutory injunction may be granted where it appears to the judge to be just or convenient to do so. The test for granting an injunction is not in dispute. The test consists of three parts:

- a. There is a serious issue to be tried;
- b. The moving party will suffer irreparable harm if the relief is not granted; and
- c. The balance of convenience favours granting the injunction: *RJR MacDonald Inc. v. Canada (Attorney General)* [1994] 1 SCR 311 at p. 335-337.

[22] The test is not to be rigidly applied. It is to be considered as a whole. Strength in one part of the test can make up for a weakness in another. The court is to consider, in light of the three parts of the test, whether injunctive relief is appropriate: *Brown v. First Contact Software Consultants Incorporated*, 2009 CanLII 48504 (ONSC), at paras. 21-22.

Serious Issue to be Tried

[23] The first branch of the test requires the Court to make a preliminary assessment of the merits of the underlying claim. The serious issue to be tried is a fairly low bar. The motions judge need only be satisfied that the underlying claims are neither vexatious nor frivolous: *RJR MacDonald Inc. v. Canada (Attorney General)*, at paras. 54-55.

[24] The LSO argues that the Osgoode property is a single indivisible heritage site, with three separate owners; the LSO, Metrolinx and the Province of Ontario. The *Heritage Act* provides that no owner shall alter or permit the alteration of a heritage site. LSO argues that as an owner of a heritage site, it had an obligation to ensure that another owner of the same site does not make any alterations that would adversely affect the site.

[25] The LSO made an application to the City of Toronto Council pursuant to s. 33(1) of the *Ontario Heritage Act*. Section 33(1) of the *Ontario Heritage Act* provides as follows:

33 (1) No owner of property designated under section 29 shall alter the property or permit the alteration of the property if the alteration is likely to affect the property's heritage attributes, as set out in the description of the property's heritage attributes in the by-law that was required to be registered under clause 29(12)(b) or subsection 29(19), as the case may be, unless the owner applies to the council of the municipality in which the property is situate and receives consent in writing to the alteration.

[26] The LSO acknowledges that its argument that it has the right to restrict Metrolinx's use of its property because both are owners of an indivisible heritage site, is unique. The LSO states that although the claim may be novel, that is not a basis to find that the threshold for a serious issue to be tried is not met: *2788610 Ontario Inc. v. Bhagwani*, 2022 ONSC 905, at para. 15.

[27] Metrolinx argues that an injunction is relief that is ancillary to a cause of action. If there is no underlying cause of action, there is no legal basis to grant an injunction: *SusGlobal Energy Corp. v. Hamaliuk*, 2021 ONSC 7199, at para. 26. Metrolinx states that there is no active claim brought by the LSO against Metrolinx. The only underlying action relied upon by LSO is the application under s. 33 of the *Ontario Heritage Act*. Metrolinx is not a party to that application. Metrolinx argues that s. 33 does not apply to it because it does not govern property owned by the provincial Crown or prescribed public bodies. Metrolinx is a prescribed body pursuant to O.Reg. 15/10. Metrolinx states that in the absence of an active claim or relief against Metrolinx the LSO cannot bring an injunction against it: *Delta Power Equipment Ltd. v. Kubota Canada Ltd.*, 2018 ONSC 3595, at para. 10.

Irreparable Harm

[28] The moving party must establish that if the injunction is not granted, it will suffer harm that cannot be quantified in monetary terms or cannot be cured. The court must consider the nature of the harm rather than the magnitude: *RJR MacDonald Inc. v. Canada (Attorney General)*, at para. 64.

[29] The LSO argues that without injunctive relief mature trees will be removed, fundamentally reshaping the landscaped lawn and gardens. The LSO states that the heritage site is indivisible and therefore harm to one part of the site is harm to the entire site, including that part of the site owned by the LSO. The LSO argues that once removed, the trees cannot be replaced. The loss of the mature trees is not harm that can be compensable through a monetary award.

[30] Metrolinx argues that to satisfy the test for an injunction, the irreparable harm must be personal to the applicant and not be some generalized harm to the community at large: *Beausejour v. Yekkooche First Nation Indian Band*, 2003 FC 1213, at para. 10. The argument that the look of the heritage site will be harmed by the removal of trees from Metrolinx's land, is not damage to LSO's property. No trees will be removed from the LSO's property. Metrolinx also argues that even if the alternative Campbell House site is used for the station, the same trees will have to be removed from the Osgoode site. Finally, Metrolinx notes that all of the harms advanced by LSO

were harms that were well known when Metrolinx received approval of the heritage minister. LSO did not bring an application for judicial review.

Balance of Convenience

[31] In considering the balance of convenience, the court must determine which of the two parties will suffer the greater harm from either granting or refusing to grant the injunction pending a determination on the merits: *RJR MacDonald Inc. v. Canada (Attorney General)*, at paras. 62-63, and *Gunning and Associates Marketing Inc. v. Kesler*, 2005 CanLII 7662 (ON SC), at para. 35.

[32] The LSO seeks an interim injunction of six days. The motion would then be argued on February 10, 2023, with a complete record. The LSO states that this will allow it to consider the final Parsons report that was not released until the morning of the hearing. It would also be able to obtain a report from a heritage expert and if necessary, conduct cross-examinations. The report from the heritage expert is expected to deal with the indivisible nature of the entire Osgoode property and how the removal of trees in one section of the property affects the heritage character of the other sections. The cutting down of the trees is only taking place on weekends and therefore an interim injunction of six days duration will only result in one lost day of cutting the trees. The LSO has provided an undertaking as to damages.

[33] Metrolinx states that LSO is seeking an injunction that interferes with the ownership rights of a neighbouring property owner. Any interference may affect the ability of Metrolinx to meet a strict construction schedule. Mr Hodge deposes that if it misses the handover date of May 1, 2023, the liquidated damages claim would be between \$1-2 million per day. Metrolinx also notes that this is a public transit project that is in the public interest. The decision to use the Osgoode site was made after years of consultation and study. Metrolinx argues that in the case of public bodies the irreparable harm to the public body can be assumed to result from the restraint of the action: *Ahousaht First Nation v. Canada (Fisheries)*, 2019 FC 1116, at para. 127.

Conclusion and Disposition

[34] The test for an injunction requires the moving party to satisfy all three parts of the *RJR-MacDonald* test. The test is to be considered as a whole and weakness in one area may be made up with strength in another.

[35] Here, there is an issue as to whether LSO has met the serious issue to be tried requirement of the test. There is no direct cause of action as against Metrolinx. The only underlying proceeding is the s. 33 application under the *Ontario Heritage Act* brought by LSO to the City of Toronto Council. Metrolinx is not a party to that application, and this section of the *Act* is not applicable to Metrolinx because it is a prescribed public body.

[36] The LSO argues that the Osgoode grounds is an indivisible heritage site that is owned by three different entities, and that as an owner of an indivisible heritage site, it has a right to pursue relief under s. 33 of the *Act*, against another owner. I have some concerns as to whether this argument will ultimately prevail. As noted above, Metrolinx is a prescribed public body and is not governed by this section. It is governed by Part III.1 of the *Act*. Metrolinx complied with this part of the *Act* when it obtained the approval of the Minister on March 18, 2021. The LSO did not bring

a judicial review of that decision. There is also the issue of whether any of the remedies under s. 33(6) would apply to Metrolinx.

[37] The LSO concedes that it is advancing a unique argument. It states that to allow a Judge to properly consider the argument, it requires time to put additional relevant material before the court.

[38] Ms. Miles deposed that she understood that there would be further consultation after the Parsons report was released. The Parsons report was commissioned by the City to address alternative sites. Although Mr. Hodge denies that there was any representation made by Metrolinx that it would not commence the work until after there was consultation on the report, I find that Ms. Miles' understanding is not unreasonable. Why commission a report if it is not going to be considered? The Parsons report was not released until the morning of the injunction hearing. The report concludes that the Osgoode site is the most appropriate, but also states that the Campbell House site may be an appropriate alternative. Metrolinx argues that the Campbell House site is also a heritage site and that even if chosen, the same trees at Osgoode would have to be removed. While ultimately this may be found to be the case, it is my view that the LSO ought to have an opportunity to consider the complete report and conduct further investigation.

[39] The LSO also argues that it requires time to obtain a report from a heritage expert that deals with whether the site is an indivisible heritage site and how a loss of trees in one section will affect the heritage status in another section. The LSO takes the position that it held off on obtaining a report until after the Parsons report was released. As noted above, Ms. Miles expected there would be an opportunity for further consultation after the Parsons report was released and did not anticipate that work on the trees would be started the same day as the report was released. Although it may have been prudent for the LSO to have obtained such a report earlier, I find that it is not wholly unreasonable to wait for the Parsons report.

[40] The LSO also states that it may require cross-examination of Mr. Hodge on his affidavit. The affidavit is fairly lengthy and with the attachments is over 1100 pages. The draft affidavit was provided shortly before the hearing and the affirmed affidavit was provided after the hearing. I am in no way being critical when pointing this out. To the contrary, counsel are to be commended for how quickly they were able to put the materials before the court. As noted by counsel for LSO at the hearing, everyone was scrambling to bring the motion on an urgent basis once it was discovered that Metrolinx was starting to remove the trees. I am of the view that it is not unreasonable for the LSO to want to consider the extensive material and determine whether it wishes to cross-examine Mr. Hodge.

[41] I am of the view that the LSO should be given an opportunity to advance its argument that s. 33 of the *Act* applies to an indivisible heritage site with multiple owners, on a complete record. At this time, I am not prepared to find that the unique argument advanced by the LSO is not a serious issue to be tried. This conclusion is not, of course, binding on the judge who ultimately hears the injunction motion, on a more complete record.

[42] With respect to the issue of irreparable harm, LSO advances a similar argument. Although the trees are not being removed from its property, the trees are being removed from the Osgoode grounds which, it argues, is an indivisible heritage site. The LSO argues that an alteration of one area of the indivisible heritage site would result in harm to the owners of the other areas. The LSO

argues that it requires additional time to obtain the report of a heritage expert which will further address this issue. If the injunction is not granted, Metrolinx will continue to remove the trees from the Osgoode site. I am satisfied that the LSO has established that if the injunction is not granted, it will suffer irreparable harm that cannot be compensated for with monetary damages.

[43] I am also satisfied that the balance of convenience favours the granting of the interim injunction. The interim injunction will be in effect for six days to provide an opportunity to the LSO to fully consider the Parsons report and obtain a report from a heritage expert. The tree cutting is only taking place on weekends and therefore only one tree cutting day (February 5, 2023) is affected by the interim injunction. Although I acknowledge that the interim injunction will adversely affect Metrolinx, it is my view that the loss of one day of tree cutting does not tip the balance in its favour.

[44] In conclusion, I am of the view that it is just and convenient to grant an interim injunction which restrains Metrolinx from cutting down any more trees at the Osgoode site. The interim injunction is in effect until midnight February 10, 2023, unless it is extended by further order of this court.

[45] Costs of this motion are reserved to the judge hearing the injunction motion.

[46] I am not seized.



C HALKORS, J.

Date: February 5, 2023