# COURT OF APPEAL FOR ONTARIO

CITATION: Temagami (Municipality) v. Temagami Barge Limited, 2024 ONCA 859
DATE: 20241126
DOCKET: M55500 (COA-24-CV-1067)

Gomery J.A. (Motions Judge)

BETWEEN

Corporation of the Municipality of Temagami

Respondent/Responding Party

and

Temagami Barge Limited*, Dashiel Lowery Delarosbel* and His Majesty the King in Right of the Province of Ontario as represented by the Minister of Northern Development, Mines, Natural Resources and Forestry

Appellants/Moving Parties*

Leo F. Longo and Brian Chung, for the appellants/moving parties, Temagami Barge Limited and Dashiel Lowery Delarosbel

Charles M. Loopstra and Jenelle Westworth, for the respondent, Corporation of the Municipality of Temagami

Eunice Machado, for the respondent Crown, present but making no submissions

Heard: November 19, 2024

## ENDORSEMENT

[1] The appellants, Temagami Barge Limited ("Temagami Barge") and its principal, Dashiel Lowery Delarosbel ("Mr. Delarosbel"), move for a stay of an order

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made by Justice Julie Richard on September 20, 2024. For the reasons that follow, the motion is dismissed.

**Background**

[2] Since 1988, Temagami Barge has carried out its business activities at 1658 Temagami Access Road, a property on the shores of Lake Temagami (the "Property"). It offers services primarily to local cottage-owners. These customers depend on services provided by barge as all cottages on Lake Temagami are located on islands.

[3] On September 20, 2024, following a two-day hearing, Richard J. granted an application by the respondent Corporation of the Municipality of Temagami (the "Municipality") for a permanent injunction under the *Municipal Act, 2001*, S.O. 2001, c. 25. The injunction restrains Temagami Barge and Mr. Delarosbel from conducting thirteen specific commercial activities on the Property. Justice Richard held that these uses of the Property are not permitted under By-Law No. 06-650, as amended (the "2006 By-Law"), and the uses are not grandfathered under the 2006 By-Law or s. 34(9) of the *Planning Act*, R.S.O. 1990, c. P.13. The activities on the Property prohibited by the injunction include sewage waste disposal service and a propane dispensary service expanded beyond the original scope of the service that was available on February 23, 2006, the day the 2006 By-Law was enacted.

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[4] The injunction specifically permits Temagami Barge to continue barge operations for lawful business on the Property; to use the Property for aggregate storage and outdoor storage for its construction business; and to operate a propane dispensary service at the level available on February 23, 2006. The application judge rejected the Municipality's argument that the respondents' unlawful activities constitute a public nuisance justifying a full or partial closure of the Property for up to two years under s. 447.1 of the *Municipal Act*. She also rejected the Municipality's request for an order for the removal of two sea-can containers and an office trailer from the Property.

[5] The Property is situated on land owned by the respondent provincial Crown. In separate proceedings, as yet unresolved, the Crown takes the position that Temagami Barge is illegally occupying the Property. It supported the Municipality's application.

[6] The appellants are appealing the application judge's order on the basis that she misapprehended the applicable legal tests and principles, made procedural errors, and made errors of fact and mixed fact and law. They also contend that she erred in awarding substantial indemnity costs against them without first seeking submissions on this issue or giving reasons.

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**Analysis**

[7] The test for staying an order pending appeal is the same as the test for an interlocutory injunction: *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at pp. 676-77. The court should consider whether the moving party has shown that: (1) there is a serious issue to be determined; (2) if a stay is not granted, the moving party will suffer irreparable harm; and (3) the balance of convenience favours a stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334.

[8] After considering these factors, the court will determine whether the overall interests of justice call for a stay: *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 223 O.A.C. 102, at para. 15; *Zafar v. Saiyid*, 2017 ONCA 919, at para. 18. The strength of the moving party's argument on one stage may compensate for its weakness on another: *Circuit World*, at p. 677.

**(1) Is there a serious issue to be determined on appeal?**

[9] The threshold for finding that there is a serious issue to be determined on appeal is low. As held in *RJR-MacDonald*, at pp. 337-38:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

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[10] The appeal will turn, in part, on the consideration of whether some or all of Temagami Barge's current activities on the Property constitute new uses since 2006, or merely an intensification, expansion or alteration of a pre-existing activity based on the criteria set out in *Saint-Romuald (City) v. Olivier*, 2001 SCC 57, [2001] 2 S.C.R. 898. Without commenting in any way on the relative strength of the appellants' arguments on this or any other issue, I find that the grounds raised in the appeal are not frivolous. The first part of the test therefore favours granting a stay.

**(2) Will there be irreparable harm if a stay is not granted?**

[11] Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald*, at p. 341. A permanent loss of market share may constitute irreparable harm. An applicant for a stay cannot, however, rely on speculative evidence about irreparable harm. Their evidence must establish that there is a high degree of probability that permanent and non-compensable harm will in fact occur: *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, at p. 458; *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, at p. 135 (F.C.A.), leave to appeal refused, [1991] S.C.C.A. No. 309.

[12] Mr. Delarosbel swore two affidavits in support of the motion to stay. Most of his evidence about irreparable harm focusses on potential harm to the appellants'

customers if a stay is not granted. His evidence on the harm that the appellants themselves may suffer consists of a single paragraph in his October 16, 2024 affidavit:

> [T]here is a significant risk that with the passage of time we will permanently lose many or all of our customers. We have been servicing many of our customers for over 30 years. If they cannot rely on us to service their properties, they will likely find alternatives or workaround (*sic*), and then not return.

[13] Mr. Delarosbel was not cross-examined. The appellants therefore argue that his assertion about the risk of harm to the appellants is unchallenged.

[14] Even if I were to accept that Mr. Delarosbel's assertion is unchallenged, however, the assertion does not establish that the appellants would likely suffer irreparable harm if a stay is not granted pending the adjudication of the appeal. At the motion hearing, counsel for the appellants advised that they expected to perfect the appeal on November 25, 2024. It could therefore be heard within the next six months, or less if an expedited hearing date is ordered. Mr. Delarosbel's affidavit does not say that the appellants' business is at risk if they cannot perform prohibited activities on the Property in the next few months. It alludes only to a risk of customer loss over an unspecified "passage of time".

[15] This lack of clarity is important since many if not most of the appellants' services to their customers involve navigation over Lake Temagami by barge. As Mr. Delarosbel mentions elsewhere in his affidavit, Lake Temagami freezes over

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during the winter. Based on this evidence, I infer that the appellants do not provide critical services to its customers during part of the year and that the impact of the permanent injunction on the appellants while the Lake is frozen is less likely to be significant.

[16] In addition to being vague, Mr. Delarosbel's assertion about the impact of the permanent injunction on the appellants is uncorroborated. He has produced a single email exchange with a customer. When Mr. Delarosbel advised this customer of the injunction on September 27, 2024, the customer responded that his summer cottage would be "virtually unusable" if his sewage tanks could not be pumped out. The customer does not indicate that he requires pump out services imminently or that he will cease relying on the appellants for these and other services if they cannot perform this service in the next few months.

[17] As mentioned earlier, much of the evidence and the argument on the motion concerned whether the appellants could continue to offer services from a location other than the Property. In a responding affidavit, Daryl Bell, a Municipal Law Enforcement Officer for the Municipality, stated that a public dock near the Property, the Mine Road Landing Public Dock (the "Mine Road Dock"), accommodates barge docking and loading and is used for this purpose by companies offering some of the same services as Temagami Barge. In his supplementary affidavit, Mr. Delarosbel contends that the 2006 By-Law does not

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permit the delivery of hazardous or contaminated waste to the Mine Road Dock. He relies on the wording of the By-Law, an October 2008 letter from the Minister of the Environment, and Mr. Bell's acknowledgement, in cross-examination that he did not know the terms of the land use permit issued by the province to the Municipality that governs the use of the Mine Road Dock.

[18] It is difficult to accept that the 2006 By-Law prevents the appellants from using the Mine Road Dock as the Municipality suggests when the employee of the Municipality responsible for enforcing its zoning by-laws says they could. In any event, the appellants' inability to perform certain activities by itself does not, in of itself, constitute irreparable harm. The limitation on the appellants' activities could result in irreparable harm if it were likely to result in a permanent loss of business pending the adjudication of the appeal. But, as already noted, Mr. Delarosbel's evidence on that issue is vague and uncorroborated.

[19] Mr. Delarosbel asserts that there is another kind of irreparable harm that will occur in the absence of a stay. He says that the appellants' customers will be harmed if they cannot offer sewage pump out services before Lake Temagami freezes over, because the customers' sewage holding tanks may overflow, freeze, and spill into the Lake. Similarly, cottage owners who rely on the appellants for propane delivery to heat their home, cook, and refrigerate their food will not be able to procure enough fuel to last through the winter.

[20] I do not find this evidence persuasive. In his affidavit, Mr. Bell identifies other companies that offer sewage pump out services and propane delivery on Lake Temagami. This evidence undercuts the appellants' argument that its customers may be injured if a stay is not granted. The appellants' argument on this point is also contradicted by Mr. Delarosbel's own assertion that, if the appellants' customers cannot rely on them to service their properties, they will find alternatives.

[21] A more fundamental problem with the appellants' argument about potential harm to their customers is that the damage to third parties is generally irrelevant at this stage of the *RJR-MacDonald* analysis. As this stage, "the only issue to be decided is whether a refusal to grant relief could so adversely affect <u>the applicants' own interests</u> that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" (emphasis added): *RJR-MacDonald*, at p. 341. As stated in *Daniel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, at para. 22: "The purpose of an interlocutory injunction is to preserve the status quo between the parties and not among third parties."

[22] The appellants rely on *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134, 51 C.P.C. (8th) 253, at para. 46, to argue that irreparable harm

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to third parties may be considered under the second or third stage of the *RJR-MacDonald* inquiry.

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[23] The analysis in *M & M Homes* must be considered in the factual context of that case. The appellant, 208 Ontario, was appealing an order granting specific performance of an agreement to sell real estate to the respondent. The order was a vesting order in M&M's favour. When 208 Ontario brought a motion for a stay of the order pending appeal, M&M opposed it on the basis that, after the litigation commenced, 208 Ontario had transferred the property to a related company and so could not prove that it, as opposed to the new owner of the property, would suffer irreparable harm if a stay were not granted. Paciocco J.A. rejected this argument. He found that both 208 Ontario and its successor in title had an interest in the outcome of the case. Furthermore, as a matter of equity, because M&M had sought a vesting order only against 208 Ontario, he found that it could not rely on 208 Ontario's lack of interest in the property to resist a stay.

[24] The situation in the case before me is entirely different. Unlike the successor in title to the party seeking a stay in *M & M Homes*, the appellants' customers are strangers to this litigation with no direct potential interest in its outcome. There are no equitable considerations arguing against requiring the appellants to show that they themselves, as opposed to third parties, would suffer irreparable harm.

[25] Overall, the appellants' evidence on the risk of irreparable harm pending the appeal is not compelling.

### (3) Does the balance of convenience favour a stay?

[26] This factor requires "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 129.

[27] The appellants argue that the balance of convenience favours them because they offer an "invaluable service" to members of the public, in particular owners of cottages on Lake Temagami, while the Municipality will not suffer any harm or prejudice if a stay is granted. They point out that the application judge rejected the Municipality's request for a partial or complete closure of all operations on the Property for two years, and that Temagami Barge has been conducting its activities on the Property for thirty-five years. In their submission, a stay would simply preserve the *status quo* until the appeal is adjudicated.

[28] I find that the public interest favours enforcing the injunction. In *Metropolitan Stores*, at p. 149, Beetz J. stated that, where the authority of a law enforcement agency is challenged, "no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given

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the weight it should carry.” Harm to the public interest as a result of a stay of the enforcement of a law is presumed. In *RJR-MacDonald*, at p. 346, the Supreme Court affirmed that:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. … The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[29] As a result, courts are generally reluctant to grant a stay or an injunction that would prevent the government from enforcing the law: *Maple Ridge (District of) v. Thornhill Aggregates Ltd.* (1998), 54 B.C.L.R. (3d) 155 (C.A.), at para. 9; *Saskatchewan (Minister of Environment) v. Redberry Development Corp.*, [1987] 4 W.W.R. 654 (Sask. Q.B.), at para. 18, aff'd [1992] 2 W.W.R. 544 (Sask. C.A.).

[30] In *Royal Canadian Horse Artillery Brigade Assn v. Kingston (City)*, 2003 CanLII 49319 (Ont. S.C.), at p. 12, Robertson J. found, in the context of a request for an interlocutory injunction to suspend an anti-smoking by-law pending a hearing on a constitutional challenge to its validity, that:

> If the interlocutory injunction is granted, then I am suspending the operation of duly enacted by-laws of the City of Kingston, prior to a determination on the merits of its legal validity. The orderly functioning of government,

> and the application of laws enacted by democratically elected legislatures, including municipal councils, for the common good could be disrupted.

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[31] The same reasoning applies in this case, especially since the merits of the Municipality's position have already been tested. The Municipality does not need to adduce evidence of harm if a stay is granted. Harm to the public interest is presumed if the enforcement of the 2006 By-Law governing permitted uses on the Property is stayed.

[32] The public interest in enforcing the 2006 By-Law must, of course, be balanced against the other interests affected by Richard J.'s order. As I have already found, however, the appellants' evidence that they may suffer irreparable harm is vague and uncorroborated. The evidence of harm to their customers is counterweighed by evidence that there are other companies providing septic and propane services on Lake Temagami.

[33] I accordingly find that the balance of convenience weighs in favour of denying a stay.

**Conclusion**

[34] Although there is at least one serious issue to be determined on the appeal, the second and third factors in the *RJR-MacDonald* test do not support suspending the permanent injunction enforcing the 2006 By-Law on the Property. Having

considered the situation holistically, I find that the overall interests of justice do not favour a stay, particularly if the appeal is heard on an expedited basis.

[35] I accordingly dismiss the motion, but direct that a date for an appeal hearing be set on an expedited basis once the appeal is perfected. As agreed by the parties, the Municipality, as the successful party on the motion, is entitled to $10,000 in costs.

"S. Gomery J.A."

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