CITATION: *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456
COURT FILE NO.: 15-65299
DATE: 2016/05/26

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
Douglas Cardinal, Douglas Cardinal Architect Inc., Romola V. Trebilcock Thumbadoo, Dan Gagne, Larry McDermott, and Richard Jackman	Michael Swinwood, for the Appellant Douglas Cardinal
Appellant	Ronald F. Caza and Katie Black, for the Respondent, City of Ottawa
– and –	
Windmill Green Fund LPV and City of Ottawa	Paul A. Webber, for the Respondent, Windmill Green Fund LPV
Respondents	**ARGUED:** March 9, 2016 (Ottawa)

REASONS FOR DECISION

C.T. HACKLAND J.

Overview

[1] This is a motion for leave to appeal to the Divisional Court from two final orders of the Ontario Municipal Board (OMB) dated July 20, 2015 and November 17, 2015 respectively.

[2] Windmill Green Fund LPV (Windmill) applied to the City of Ottawa (the City) under the *Planning Act*, R.S.O. 1990, c. P. 13 for planning permission to redevelop certain lands within the City consisting of Chaudiere and Albert Islands located in the Ottawa River. The area in question consists of brown field lands acquired from Domtar Corporation. The lands had been used for industrial purposes for nearly 200 years and require extensive remediation. They have been closed to the public for that period of time.

[3] After a process of investigation by the City, an official plan amendment (OPA 143) was adopted and zoning by-law no. 2014-395 was enacted to facilitate the future development of these lands. The appellants appealed the plan amendment and by-law enactment to the OMB.

[4] At a pre-hearing conference held June 3, 2015, Board member, R.G.M. Makuch heard a motion brought by the City and supported by Windmill to dismiss without a hearing, the appellants' appeals, including a Notice of Constitutional Question. The Board dismissed the Notice of Constitutional Question on June 3 with reasons subsequently delivered on July 20, 2015. Subsequently, the Board member's decision of November 17, 2015, granted the motion and dismissed the appeals on the remaining issues.

[5] The Board member also declined the application by appellants' counsel to recuse himself due to criticisms he had made of appellants' counsel's conduct in a decision rendered in an unrelated matter some 10 years before. Leave to appeal from the Board member's recusal decision was not pursued in oral argument before this Court and, in any event, leave would not be granted in respect to this discretionary ruling.

The Law

[6] The application herein is brought pursuant to s. 96(1) of the *Ontario Municipal Board Act*, R.S.O 1990 c.O.28 which provides:

> Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court on a question of law."

[7] Leave to appeal can only be granted on a question of law. In addition, the case law establishes that in order to obtain leave, the applicant must show that there is reason to doubt the correctness of the decision of the Board with respect to the question of law proposed as the basis of the appeal, and the question of law must be of sufficient importance to merit the attention of the Divisional Court, see *Niagara Escarpment Commission v. Paletta*, 2007 CarswellONT 650.

[8] I respectfully adopt the statement of Dawson J. in *Niagara* with respect to the standard of review:

> ...the standard of review to be applied by the Divisional Court when reviewing a decision of the Board is reasonableness with respect to questions of law that engage the expertise of the Board, and correctness with respect to questions of law that are of general application and for which the Board has

> no special expertise: *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.) In determining whether there is reason to doubt the correctness of the Board's decision I need not be convinced one way or the other. However, the applicant must show that the correctness of the Board's decision is open to serious debate.

Issues on which Leave to Appeal is sought

[9] The appellants seek leave to appeal on the following issues:

(1) Did the Board err in quashing the Notice of Constitutional Question?

(2) Did the Board err in concluding that the amendments to the Official Plan conformed to the Provincial Policy Statement (the Policy Statement) dated April 30, 2014 and in holding that consultations were appropriate in light of the Policy Statement and the City's Official Plan?

(3) Did the Member err in law in concluding that the document entitled "Below the Falls: An Ancient Cultural Landscape in the Centre of Canada's national Capital Region", did not Apply to Chaudiere and Albert Islands?

(4) Did the Member err in law in rejecting the evidence of Douglas Cardinal also presented as an Anishinaabe Elder, as well as an architect, and the evidence of Romola V. Trebilcock Thumbadoo, thereby rejecting the Algonquin view that the Islands are a sacred site, contrary to the Policy Statement of April 20, 2014?

Issue #1

Did the Board err in quashing the Notice of Constitutional Question?

Analysis

[10] The Board member dismissed the Notice of Constitutional Question because he accepted the respondents' position that it was served out of time and because the Board was not the proper forum to adjudicate questions relating to the ownership of land, particularly when the appellants were concurrently pursuing litigation on those same issues in the Superior Court of Justice.

[11] The Notice of Constitutional Question sought the following relief:

> (a) A declaration that a right of stewardship exists for sacred indigenous lands in the claim area;
>
> (b) An order of mandamus, requiring Canada and Ontario to consult and accommodate, based upon the assertion of the indigenous title;
>
> (c) A declaration of trust, entitling a share of resources as set out in Section 109 of the *British North America Act of 1867*;
>
> (d) Compensation for lands taken from the Algonquin, in the claim territory, pursuant to the Charter of Rights and Freedoms and the Declaration of the Rights of Indigenous People (United Nations); and
>
> (e) A declaration that Provincial legislation does not apply to un-ceded, un-surrendered Algonquin territory.

[12] The Board member observed that determinations of land ownership are "more properly brought" in the courts. He was correct in this observation. The OMB lacks the remedial jurisdiction to grant declarations of title or prerogative remedies such as mandamus against the Federal Crown. In my view, the Notice of Constitutional Question was misconceived. Declarations of ownership must be sought by declaratory judgment from the courts as set out in sections 96(3) and 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[13] In argument before this Court, the appellants' counsel clarified that the only constitutional remedies he was now seeking to pursue before the Board are:

> 1. A declaration of right of stewardship for sacred indigenous lands in the claim, particularly Chaudiere Falls and Albert, Chaudiere and Victoria Islands in the Ottawa River, located in the City of Ottawa.
>
> 2. A declaration that Provincial legislation does not apply to un-ceded, un-surrounded Algonquin territory and in particular Albert and Chaudiere Islands

[14] The issues sought to be raised in the Notice of Constitutional Question do not engage the Board's primary jurisdiction which in the context of this appeal was to assess whether the City's decisions represented good land use planning.

[15] Free standing assertions of aboriginal title do not fall within the purview of the board's land use planning jurisdiction. As such, it was reasonable for the Board member to strike the claim on a summary motion. He made no error of law in so doing.

[16] In *Zellers Inc. v. Royal Cobourg Centres Ltd*, [2001] O.J. No. 3792, a leave application, following a summary dismissal, Epstein, J. noted that "the relatively new provisions regarding the dismissal of appeals without a hearing are intended to provide the OMB with greater tools to manage its hearings by allowing for the dismissal of appeals that are clearly without merit and advanced for non-planning purposes."

[17] I agree with the respondents' argument that the Board is without jurisdiction to entertain what purport to be appeals on planning grounds but are in fact arguments advanced for non-planning purposes.

[18] Furthermore, the Notice of Constitutional Question addresses issues that are at the heart of ongoing treaty negotiations between the Algonquins of Ontario and the federal and provincial governments. The Algonquins of Ontario is an organization of ten Algonquin communities created for the purpose of negotiating a land claim with the federal and provincial governments. They include a number of Algonquin communities, and the Chief and counsel of the Algonquins of Pikwakanagan First Nation. The purpose of the treaty negotiation is to provide certainty concerning the constitutionally protected rights of the Algonquins respecting lands and resources in Ontario.

Disposition on Issue #1

[19] The Board found, correctly in my view, that it lacked the remedial jurisdiction to make determinations of title and that the City's "authority under the Act to adopt Official Plans and to enact Zoning By-laws" are not tied to ownership of lands. The Board also stated, correctly in my view:

> [66] The issue as to title to the lands is not one for the Board to determine and is not relevant with respect to the planning considerations that the Board must address its mind to.

[20] As there was no error of law in the Board member's decision to strike the Notice of Constitutional Question, I see no need to discuss the Board member's discretionary decision to

refuse to grant an extension of time for late service of the Notice of Constitutional Question. This was well within his discretion in the factual circumstances presented and does not raise a question of law.

Issue #2

The applicants contend that the Board erred in concluding that the amendments to the Official Plan conformed to the Policy Statement dated April 30, 2014 and in holding that consultations were appropriate in light of the Policy Statement and the City's Official Plan.

Analysis

[21] It is the appellants' position that the Board member erred in law by not properly applying the pertinent provision of the Policy Statement. The appellants rely particularly on the provisions in the Policy Statement which provide:

> The Provincial Policy Statement shall be implemented in a manner that is consistent with the recognition and affirmation of existing aboriginal and treaty rights in section 35 of the Constitutional Act, 1982, and
>
> ...
>
> The Provincial Policy Statement shall be implemented in a manner that is consistent with the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms

[22] The appellants submit that the Board member erred in law in his conclusion that the "spirit and intent" of the policies in the City's Official Plan directed at working with the Algonquin on planning for public lands have been respected through the planning process for determining the future development for the islands.

[23] I agree with the submission of the City that the question of conformance with the Policy Statement raises questions of mixed fact and law. The Board member's reasons reflect a careful consideration of the extensive evidence before him. The Board found that the City and Windmill engaged in "an extensive consultation process" and that "the concerns of First Nations, particularly the Algonquin have been adequately considered in the adoption of OPA 143 and the enactment of Zoning By-law No. 2014-395."

[24] The Board member found at para. 57 of his reasons:

> The evidence shows that an extensive consultation process was undertaken by both the City and proponent and that the concerns of First Nations particularly the Algonquin have been adequately considered in the adoption of OPA 143 and the enactment of Zoning By-law No. 2014-395. The overall development will incorporate elements/features that will celebrate and recognize Algonquin history and culture.

[25] The Board member also observed (para. 60) that

> The Board fails to see how the consultations that took place in the lead up to the adoption of the official plan and zoning by-law amendments could be considered to be inadequate as it was not provided with any basis upon which it could reach that conclusion.

[26] The Board member's conclusion that the consultation process adequately engaged the Algonquin First Nation was based on the following findings:

(a) A finding of mixed fact and law that the City of Ottawa's Official Plan commits to an engagement with First Nations, in particular the Algonquins of Ontario ("AOO").

(b) A finding of fact that the AOO are the representative group with whom the federal and provincial governments are negotiating a treaty with for the settlement of land claims over Algonquin territory.

(c) A finding of mixed fact and law that the process of engagement followed by Windmill with the First Nations was:

> *Consistent with the City's requirements as set out in the Official Plan which, in turn, identifies the AOO as a stakeholder to be engaged with respect to planning for the future use of Chaudiere and Albert Islands.*

(d) A finding of fact that the City's Planning Department "*contacted the designated representative of the AOO to provide for formal engagement in regards to the development applications, thereby initiating the OPA*".

(e) A finding of mixed fact and law that "*[t]he consultation that was undertaken in this case was in line with the type of consultation that is customary and contemplated under the PPS as well as the City's Official Plan*".

(f) A finding of fact that this consultation resulted in the

> *Redevelopment of the lands that incorporate elements and features within the overall development that will recognize and celebrate Algonquin history and culture[,] as well as*

the overall significance of the islands to the Algonquin in particular.

(g) A finding of fact that a Stage 2 archeological assessment be undertaken prior to development as "*parts of the site exhibit the potential for significant archaeological resources associated with both First Nations and Euro Canadian settlement*". The zoning amendment contained a holding provision which could only be lifted after this condition and a Phase 2 Environmental Site Assessment were completed. The OMB found this to be demonstrative of ongoing consultations in the development process.

(h) A findings of mixed fact and law that, with respect to s. 2.6.5. of the Policy Statement, that

(i) "*the proposed development has had input from the AOO and the Algonquins of Kitigan Zibi*" and "*considered the history of the lands*" and highlights them in the development; and

(ii) The amendment seeks to raise "*awareness of the cultural heritage of the site*" and addresses archaeological resources that may be identified through the ordered assessments prior to development occurring.

Disposition of Issue #2

[27] I accept the position of the City and Windmill that the existence and discharge of the duty to consult, as reflected in the case law, is a mixed question of law, see *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 78. The existence of the duty is a question of law and the Board member clearly recognized and accepted the existence of the duty to consult and found on the evidence that it had been discharged.

Issues #3 and 4

The appellants argue that the Board member erred in law in concluding that the document entitled "Below the Falls: An Ancient Cultural Landscape in the Centre of Canada's national Capital Region", has no application to Chaudiere and Albert Islands.

Analysis

[28] The issue of whether a document entered into evidence titled "*Below the Falls: Ancient Cultural Landscape in the Centre of Canada's national Capital Region*:" does or does not apply to the Chaudiere and Albert Islands is a factual analysis of the Board member and does not engage any question of law.

[29] The applicant also argued that the Board member erred in law in rejecting the evidence of Douglas Cardinal and the evidence of Romola Trebilcock Thumbadoo, which was the evidence filed to support the appellants' proposition that the islands are historically Algonquin sacred sites. The Board member evidently considered this evidence and chose to accord it minimal weight. As he explained:

> [61] The Appellants claim that the AOO does not have the authority to speak on behalf aboriginal people, and that their authority is limited to matters on the reserves. As the Board noted above, the AOO is the group recognized by the Federal Government and Provincial Government to negotiate with in respect of the outstanding comprehensive land claim over the larger territory.
>
> [62] The Board finds that the appeals, while well intended, consist of mere apprehensions raised by the Appellants that are not worthy of the adjudicative process of the Board and do not merit a full hearing. The Appellants have had a full opportunity to elaborate on the grounds in support of their appeals and have not demonstrated that these merit a full hearing of the Board. Appellants have an obligation at the time of filing their appeals to retain the necessary experts to support these. This was not done, the only affidavit material provided were affidavits deposed by the Appellant, Douglas Cardinal, who cannot proffer professional opinion evidence in this case by reason of his being a party as an Appellant and cannot proffer unbiased and impartial opinions to the Board.

Disposition of Issues #3 and #4

[30] In the Court's view, the weighing and interpretation of evidence does not give rise to a question of law. I would note that there was no other expert evidence tendered by the applicant, Mr. Cardinal, other than his own affidavit.

[31] The Board member made the following findings with respect to the process of engagement followed by the developer, Windmill, in terms of their necessary consultation with the Algonquins of Ontario on the planning issues arising in this proposed development:

> [35] It is acknowledged and recognized by the City and Windmill that the City of Ottawa occupies un-ceded Algonquin territory and the City Official Plan commits to an engagement with First Nations in particular the group known as the "Algonquins of Ontario" ("AOO") on planning matters affecting lands that are of particular interest to the AOO. It is noted that the AOO is the group with whom the Federal Government and Provincial Government is negotiating a treaty for the settlement of a land claim over the larger territory. Windmill was advised by the City prior to the submission of its development applications that a key requirement would be for engagement with the AOO.
>
> [36] The process for engagement followed by Windmill with the First Nations was consistent with the City's requirements as set out in its Official Plan, which, identifies the AOO as a stakeholder to be engaged with respect the planning for the future use of Chaudiere and Albert Islands. The evidence shows that the City's Planning Department contacted the designated representative of the AOO to provide for formal engagement with that group in regard to the development applications and the City initiated OPA. The evidence also shows that extensive consultations took place with a number of well attended public meetings occurring, where public input was sought from both the public at large as well as with the Aboriginal community.
>
> [37] The consultation that was undertaken in this case was in line with the type of consultation that is customary and contemplated under the PPS as well as under City's Official Plan. It resulted in planning documents for a redevelopment of the lands that incorporate elements and features within the overall development that will recognize and celebrate Algonquin history and culture as well as the overall significance of the islands to the Algonquin in particular.

[32] In summary, the Court is not persuaded that the appellant, Douglas Cardinal, has raised any issues of law that merit a full hearing before the Board. The Board member concluded in careful and detailed reasons that the consultation process involving the Algonquins of Ontario was in compliance with the Policy Statement and that on the evidence, the Official Plan Amendment and the By-law in question represent appropriate planning. His findings are reasonable and do not present questions of law.

[33] Underlying the Board's decision is the correct premise that it is not the Board's function to adjudicate issues of Aboriginal title, or to declare or recognize the lands in question as a sacred site to the Algonquins, other than in the context of the duty to consult embodied in the case law and the Policy Statement. The consultation process was carried out fairly and the appellants presented no evidence that they were precluded from involvement in that process.

[34] I see no questions of law in respect of which I doubt the correctness of the Board member's decision.

Conclusion

[35] Leave to Appeal from the OMB rulings of July 20, 2015 and November 17, 2015 is refused.

Costs

[36] If the respondents wish to seek costs, they should provide a concise written submission within 30 days of the release of these reasons and the appellant will respond within 30 days of being served with the respondents' submission.

Hackland J.

Mr. Justice Charles T. Hackland

Released: May 26, 2016

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C.T. Hackland. J.

Released: May 26, 2016