CITATION: CAMPP Windsor Essex Residents Association v. City of Windsor, 2021 ONSC 3456
COURT FILE NO.: 468/20
DATE: 20210511

SUPERIOR COURT OF JUSTICE – ONTARIO – DIVISIONAL COURT

RE: CAMPP Windsor Essex Residents Association v. City of Windsor, Windsor Regional Hospital and 386823 Ontario Ltd.

COUNSEL: *Eric K. Gillespie*, for the Moving Party CAMPP

Peter Gross and Jennifer King, for the Respondent City of Windsor

Brian Gover, Dragana Rakic and Kim Mullin, for the Respondent Windsor Regional Hospital

BEFORE: D.L. Corbett J.

DATE HEARD: December 15, 2020

ENDORSEMENT

D.L. CORBETT J.

[1] This case concerned planning approvals for a new regional hospital in Windsor. The Land Planning Appeal Tribunal ("LPAT") approved the City's proposed location of the new facility on December 3, 2019.[1] The moving party sought leave to appeal to the Divisional Court from the decision of the LPAT. Leave was denied by Verbeem J. on July 29, 2020.[2]

[2] As acknowledged by the moving party, there is no appeal or review of a decision granting or refusing leave to appeal to the Divisional Court in this case: the matter is at an end.[3] In any event, the moving party has not purported to appeal or sought to review the decision refusing leave to appeal, so on any view of the case the issue has been decided on a final basis.

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[1] *CAMPP Windsor Essex Residents Association* v *Windsor (City)*, 2019 CanLII 114467 (ON LPAT).
[2] *CAMPP Windsor Essex Residents Association* v. *Windsor (City)*, 2020 ONSC 4612 (Div. Ct.).
[3] There are very limited exceptions to this general principle that do not apply in the circumstances of this case: *Millcraft Investment Corporation v. Ontario (Regional Assessment Commissioner, Region No. 3)*(2000), 46 OR (3d) 685 (Div. Ct.), paras. 24-26; *Exchange Tower Ltd. v. Municipal Property Assessment Corp.*, 2012 ONSC 415 (Div. Ct.), para. 5; *Universal Am-Can Ltd. v. Tornorth Holdings Ltd.* (2003), 47 CPC (5th) 304 (Div. Ct.), para. 3.

[3] The moving party now seeks to review before a panel of three judges of the Divisional Court interlocutory decisions said to have been made by Verbeem J. in the course of deciding the motion for leave to appeal. In this motion, the moving party seeks an extension of time in which to bring its proposed review of the impugned interlocutory rulings. It also seeks an extension of time in which to review the costs order of Verbeem J.

[4] For the reasons that follow, the motion for an extension of time is dismissed.

Test for an Extension of Time

[5] The test for an extension of time is as follows:

> The overarching principle is whether the justice of the case requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:
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> (a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
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> (b) the length of and explanation for, the delay in filing;
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> (c) any prejudice to the responding parties, caused, perpetuated or exacerbated by the delay; and
>
> (d) the merits of the proposed appeal.[4]

[6] Even if the moving parties could meet the first three branches of the test for an extension, their motion founders on the fourth branch of the test. The proposed review is devoid of merit.

1. The Impugned Rulings Merge in the Decision Denying Leave to Appeal

[7] The impugned interlocutory rulings could have been susceptible to review if they had been made before the hearing of the motion for leave to appeal. However, since they were made during the course of the hearing of the motion for leave to appeal, they merge in the leave decision. This may be understood by analogy to an appeal from a trial judgment. In a civil case, a trial judge may make numerous rulings about evidence and process during a trial. All of these are part of the trial and are susceptible to challenge on appeal from the trial judgment. So, for example, if a trial judge excludes evidence, the trial does not stand down while a party pursues appeal rights in respect to that evidentiary ruling. The trial continues, judgment is delivered, and then the impugned ruling may be raised on an appeal from the judgment, but not independently

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[4] *Enbridge Gas Distribution Inc.* v. *Froese*, 2013 ONCA 131, para. 15.

of such an appeal. In the context of a denial of leave to appeal, any other approach would undermine the purpose of the narrow scope of review of denials of leave to appeal.[5]

2. The Impugned Rulings Are Now Moot

[8] The impugned rulings are only material to the decision on the motion for leave to appeal. That motion has been decided on a final basis and is not subject to appeal or review in this court.[6] Whether the motions judge did or did not err in respect to an evidentiary issue related to his decision does not matter now, since the decision itself cannot be appealed or reviewed. Again, by way of analogy to a trial judgment, where a trial judge delivers a judgment and no appeal is taken from that judgment, it is not open to the parties to pursue an appeal from a ruling made during the course of the trial. If, for example, the trial judge rules that a piece of tendered proof is inadmissible for some reason, no appeal may be brought from that ruling independent of an appeal from the trial judgment. The reason is obvious. Review of an interlocutory decision cannot be used as a collateral attack on the main decision. Consider the process to be followed if this was not the case: during a trial the trial judge makes a dozen evidentiary rulings. Each is an "interlocutory" ruling, standing on its own, since none disposes of an underlying issue between the parties on a final basis. The trial ends and judgment is rendered. Then the parties launch a series of motions for leave to appeal to this court in respect to all of the evidentiary rulings made by the trial judge, but no one brings an appeal of the trial judgment to the Court of Appeal.

[9] What would be the point of this? There would be none. The correctness of the evidentiary rulings is immaterial, at this stage, except to the extent that those rulings bear upon the final decision. All of the rulings are rendered moot, in and of themselves, and no appeal will be permitted from them independent of an appeal from the judgment. In saying this, I acknowledge that a trial judge could make rulings that have life independent of the judgment itself – for example, an order sealing the file. I need not decide whether special considerations might apply to review of an interlocutory ruling that has independent force beyond the judgment itself, since that circumstance does not arise in this case: the impugned rulings have no effect other than, theoretically, in respect to the merits of the leave decision.

3. Attempt to Do Indirectly What May Not Be Done Directly

[10] It is evident that the underlying goal of the moving parties is to challenge the decision of Verbeem J. refusing leave to appeal. There is no point in challenging the impugned interlocutory rulings otherwise. Thus, the proposed review is, on its face, only useful as a collateral attack on a final decision. That is an abuse of process.

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[5] *Hillmond Investments Ltd.* v. *Canadian Imperial Bank of Commerce* (1996), 29 OR (3d) 612 (CA).

[6] Where the court denying leave to appeal considered the leave application on its merits, its decision must stand: *Canadian Utilities Ltd.* v. *Deputy Minister of National Revenue*, [1964] SCR 57 at 63. Judicial review may be available from a decision denying leave to appeal, but only on the basis that the motions court erroneously declined jurisdiction: *Nithianthan* v. *Quash*, 2017 ONSC 1359 (Div Ct), paras. 6-7;

4. The Costs Issue

[11] The ability to appeal the costs ruling below should be no greater than the ability to appeal the substantive ruling itself. Indeed, in most situations, costs appeals are far more restricted than are substantive appeals.

[12] In the context of a costs order made on a motion for leave to appeal, the same principles should apply that apply to the leave decision itself. Review of the costs order is available in a very narrow range of circumstances where it can be said that the court below has refused to exercise its jurisdiction or has exceeded its jurisdiction in making a costs award. That does not apply here. The motions judge gave reasons for his costs decision. He cited and applied the controlling jurisprudence. There is no basis for arguing that he failed to exercise his jurisdiction or exceeded his jurisdiction.

[13] Further and in any event, there is no merit to the proposed review of the costs order. There is no rule that "public interest litigants" are not entitled to or should not be liable for costs. The motions judge addressed this issue thoroughly in his reasons, and there can be no serious argument that his decision to award costs was well within his discretion. The amounts awarded were entirely in keeping with the general expectations for likely costs awards for a motion of the kind that was heard over two days' of argument. A review of the costs award would be doomed to failure in this court and would result in further costs being awarded against the moving party. Further, if I had exercised discretion to grant an extension for review of the costs order, I would have required the moving party to post security for costs for the costs awarded below and the likely costs that could be awarded on the review motion. The applicant was incorporated for the purpose of challenging the City's decision about the location of the hospital. As a result, the persons behind the Applicant have insulated themselves from personal liability for costs awards in this case. I see no basis for permitting them to cause the Applicant to pursue a review of the costs order without ensuring that they put the Applicant in funds to pay the disputed costs and the costs of the review.

5. Other Issues

[14] On any view of it, the moving party was late with its request to review. The impugned interlocutory rulings were made on May 6, 2020 and May 11, 2020. CAMPP should have sought review of those rulings immediately, and certainly prior to the decision on the motion for leave to appeal itself, which was not rendered until July 29, 2020. The costs ruling was rendered within the leave decision, on July 29, 2020.

[15] Technically, the request to review was not late until late September 2020, because of the suspension of deadlines during the COVID crisis. No reasonable explanation has been offered for failing to meet this extended deadline. Ordinarily, the deadline to seek review of an interlocutory ruling is fifteen days. Missing the technical deadline, already extended by four months, and well beyond the point of all practicality in the circumstances of the case, leads this court to conclude that it would not exercise its discretion to grant the extension in any event.

[16] Finally, on the underlying issues there is no apparent merit in the proposed review and no basis to suppose that the issues under review would have changed the final disposition of the motion for leave to appeal. The request to adduce "fresh evidence" respecting COVID-19 bordered on the absurd. Of course, the site of the new hospital did not take into account a pandemic that had not happened at the time of the LPAT hearing. But no basis was provided to suggest that general principles of public health were not taken into account in siting the new hospital. COVID-19 is neither the first nor will it be the last contagion to visit Ontario, and one of the purposes of a hospital is to treat people suffering from disease. In respect to the second issue raised by the moving party, the ruling it seeks to challenge was never made by Verbeem J. The City did not seek to adduce new evidence, as is clear from the extensive reasons given.

Disposition

[17] There comes a time when a litigation cause has been lost. It is over. In this case, that came when Verbeem J. refused leave to appeal from the decision of the LPAT. This motion is an attempt to continue or re-open litigation that is concluded. The motion for an extension of time is dismissed with partial indemnity costs fixed at $15,000 to the Windsor Regional Hospital and $12,500 to the City of Windsor, both amounts inclusive, and both amounts payable within thirty days.

[18] This court has case managed this matter in Divisional Court. If the moving parties seek to review this ruling before a panel of the Divisional Court (which they are entitled to do as of right, since I have decided the issue on a motion for an extension rather than pursuant to R.2.01), then case management of that further process shall be conducted by Favreau J. or as Her Honour may direct, and for obvious reasons I will not preside in any motion for security for costs that may be brought in connection with such a review.

D.L. Corbett J.

Date: May 11, 2021