Date: 20100216

Docket: 10-A-1

Citation: 2010 FCA 45

Present: **NADON J.A.**

BETWEEN:

METROLINX, operating as GO TRANSIT

Applicant

and

**THE CANADIAN TRANSPORTATION AGENCY,
GLENN STALKER on behalf of THE WEST TORONTO DIAMOND
COMMUNITY GROUP, and THE CITY OF TORONTO**

Respondents

Heard at Toronto, Ontario, on January 28, 2010.

Order delivered at Ottawa, Ontario, on February 16, 2010.

REASONS FOR ORDER BY: NADON J.A.

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REASONS FOR ORDER

NADON J.A.

[1] The respondent, Glenn Stalker on behalf of the West Toronto Diamond Community Group (the "Community Group") seeks an Order granting it:

1. An award of its costs to date for responding to the interim stay and stay motions of the applicant Metrolinx, operating as GO Transit ("GO Transit"), including the costs of the cross-examination of Michael Wolczyk, for responding to GO Transit's leave application, and for the costs of the within motion fixed at $15,000 payable by GO Transit forthwith to *bakerlaw* in trust for the Community Group and in any event of the cause.

2. An award of interim costs in the amount of $25,000 payable by GO Transit to *bakerlaw* in trust for the Community Group, in the event that leave to appeal is granted by this Court.

[2] Specifically, the Community Group seeks an Order of costs payable forthwith in the sum of $15,000 with regard to this motion and to Go Transit's motion for a stay of Canadian Transportation Agency decision 507-R-2009 and for leave to appeal. The Community Group also seeks an Order of interim costs in the sum of $25,000, payable to its counsel in trust, should leave to appeal be granted by this Court.

[3] Leave to appeal to this Court was granted on February 11, 2010.

[4] I will deal first with that part of the Community Group's motion which seeks an award of costs payable forthwith. Rule 401 of the *Federal Courts Rules* provides as follows:

401. (1) The Court may award costs of a motion in an amount fixed by the Court.	**401.** (1) La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.
(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.	(2)Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou opposée, elle ordonne que les dépens afférents à la requête soient payés sans délai.
[Emphasis added]	[Non souligné dans l'original]

[5] In the circumstances of this case, I cannot see any basis upon which I could conclude that costs payable forthwith are justified. In other words, there is absolutely no basis to conclude that GO

Transit's motion for a stay and for leave to appeal should not have been brought. Consequently, that part of the motion will be denied.

[6] I now turn to that part of the Community Group's motion which seeks interim costs in the amount of $25,000.

[7] The test for such an award can be found in two decisions of the Supreme Court of Canada, namely: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue Agency)*, [2007] 1 S.C.R. 38, and *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371.

[8] In *Okanagan Indian Band*, *supra*, the Supreme Court, at paragraph 40, sets out the test which must be met to justify an award of interim costs. LeBel J., writing for the Court, formulated the test as follows:

> **40.** With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[9] As I have not been persuaded that the Community Group cannot pay for this litigation or that other options are unavailable for bringing the issues to trial, the Community Group does not satisfy the first prong of the test. In *Little Sisters Book and Art Emporium, supra*, the Supreme Court reasserted the test which it had formulated in *Okanagan Indian Band, supra*. At paragraph 40 of their Reasons for the majority, Bastarache and LeBel JJ. make the following remarks with respect to the first prong of the test:

> **40.**. Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. …
>
> [Emphasis added]

[10] There is, in reality, no evidence as to the Community Group's inability to pay for this litigation, other than bald statements to that effect. Nor is there any evidence that it made any attempt to obtain funding or financing so as to allow it to bring the issues forward.

[11] I would also add that I am not satisfied, in any event, that the litigation would not proceed unless an order of interim costs was made. In effect, the City of Toronto has supported the position

taken by the Community Group and has filed submissions on every issue raised by these proceedings. In other words, the City of Toronto has taken an active role in these proceedings and is, for all intents and purposes, defending the rights of the Community Group.

[12] Consequently, it is clear to me that the first prong of the tri-partite test has not been met and, hence, I need not address the two other prongs. As a result, the Community Group's request for interim costs will be denied.

[13] For these reasons, the Community Group's motion for costs payable forthwith and for interim costs will be dismissed. There shall be no costs ordered on this motion.

"M. Nadon"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	10-A-1
STYLE OF CAUSE:	METROLINX v. CANADIAN TRANSPORTATION AGENCY et al.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 28, 2010
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DATED:	February 16, 2010

APPEARANCES:

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