

Federal Court



Cour fédérale

Date: 20101019

Docket: T-1468-10

Citation: 2010 FC 1021

Toronto, Ontario, October 19, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ANNAMARIA VALASTRO

Applicant

and

THE HAMILTON PORT AUTHORITY

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant, Ms. AnnaMaria Valastro, is seeking an interlocutory injunction to restrain the Respondent, the Hamilton Port Authority (HPA), from proceeding with the Farr Island Project (also referred to as the Farr Island Reconfiguration) in order to give her time to file a petition under the *Auditor General Act*, R.S.C, 1985, c. A-17 (the *AGA*) before Farr Island is submerged.

[2] Farr Island is a 30 by 35 meter man-made island in the Hamilton Harbour, which was built in the 1950s as a hydro tower platform. It has not supported any hydro towers since the 1980s, and is now a vacant island inhabited by migratory Double-crested Cormorants (cormorants). The Farr Island Project is one aspect of a larger plan by the HPA to regenerate the Hamilton shore line. Simply put, the Farr Island Project is a plan to re-grade Farr Island to below water-level, and to add new materials to imitate the shoals which were once located along the north shore of the Harbour. A consequence of submerging Farr Island will be the loss of the summer habitat to approximately 800 nesting pairs of cormorants.

[3] Ms. Valastro is opposed to the Farr Island Project. She fears that that there would be a negative impact on the cormorants who would have otherwise used Farr Island as a nesting site next year. Ms. Valastro is very concerned that an adequate environmental assessment has not been carried out as required by the *Canadian Environmental Assessment Act*, S.C. 1999, c.33 (CEAA). In particular, she submits that there has not been a full consideration of the cumulative impact of the loss of habitat for the Farr Island cormorants. For this reason, she seeks an injunction from this Court to prevent HPA from destroying the island “to allow room for a petition process”.

[4] Unfortunately, this Court is unable to assist Ms. Valastro. There are two key reasons why her motion must fail. Firstly, Ms. Valastro’s application for injunctive relief is not based on any action or application before this Court – a prerequisite to an interim injunction. Secondly, even if I could entertain the motion, Ms. Valastro has not persuaded the Court that irreparable harm would flow from the execution of the Farr Island Project.

No Proceeding before this Court

[5] The first problem with Ms. Valastro's motion is that she has not commenced any proceedings that would fall within the jurisdiction of the Federal Court. The power of the Federal Court does not extend to granting interim injunctions absent some recognized legal interest or right which is within the Court's power to adjudicate. Section 18.2 of the *Federal Courts Act* and Rule 372 of the *Federal Courts Rules* establish that a motion for injunctive relief cannot be obtained before the commencement of a proceeding. Quite clearly, Ms. Valastro has not commenced a proceeding and her motion must fail on this basis alone.

[6] As I understand the core of her concern, Ms. Valastro disputes two decisions:

1. The decision of the HPA to implement the Farr Island Project with the submersion of Farr Island as its key component;
2. The decision of the Canadian Environmental Assessment Agency (the Agency) dated August 16, 2010 (the Screening Decision).

[7] The Farr Island Reconfiguration was a decision of the HPA. The HPA is, unquestionably, a "federal board, commission or tribunal" for purposes of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Ms. Valastro has known of the HPA's decision to submerge Farr Island since at least April 2010. She could have, but never did, commenced an application for judicial review of that decision.

[8] The Farr Island Project required an environmental assessment, pursuant to provisions of the *CEAA*. In the Screening Decision dated August 16, 2010, the Agency determined that this project was not likely to cause significant environmental impacts. Notice that an environmental assessment had been commenced was available on the Agency's website from July 30, 2010. Ms. Valastro could have intervened at this stage but did not. This decision, once rendered, was made publicly available. If, as she now claims, the HPA had "misrepresented the full extent of the project and failed to represent all available options for public consideration", or if she felt that the Screening Decision was unreasonable, she could have sought judicial review. She did not do so.

[9] Having failed to commence an application for judicial review of either of these two decisions, Ms. Valastro has decided that her only avenue is to commence a petition pursuant to the *AGA*. Under the *AGA*, the Auditor General has an obligation to provide "sustainable development monitoring and reporting" (s. 21.1). Specifically, s. 22 of the *AGA* permits a resident of Canada to petition the Auditor General "about an environmental matter in the context of sustainable development". Upon receipt of such a petition "about an environmental matter in the context of sustainable development that it the responsibility of a category I department" (assumed, in this case, to be the Department of Environment), the Auditor General forwards the petition to the responsible Minister for a response. Assuming that the petition proceeds, the only obligation on the Minister is to reply to the petition. There is no authority, in the *AGA* or otherwise, for Ms. Valastro's submission that the Minister would be required to reconsider the Screening Decision. The only obligation on the Minister is to provide a written response to the Auditor General. Thus, even if Ms.

Valastro had commenced her petition (which she has not), the petition could not give rise to a process that would reverse the decision to submerge Farr Island.

[10] In sum, there is clearly no underlying proceeding for which this injunctive relief can be granted. For this reason, her motion must fail.

No Irreparable Harm

[11] Even if I were to conclude that there is a “proceeding” that could give jurisdiction to this Court to consider the motion for injunctive relief, Ms. Valastro fails to meet the requirements for obtaining an interim injunction.

[12] As taught by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, paras. 40, the test for an interlocutory injunction requires the court to consider three factors:

- 1) Whether the applicant has presented a serious issue to be tried or, in some cases, a strong prima facie case;
- 2) Whether the applicant would suffer irreparable harm if the injunction were refused; and
- 3) Whether the balance of convenience or inconvenience lies in granting or refusing to grant the injunction

[13] The tripartite test is conjunctive; an applicant must satisfy all three elements of the test before it will be entitled to relief. Failure to meet all three components results in the motion being dismissed.

[14] In this case, it is unlikely that Ms. Valastro can meet any of the elements. However, the factor that is most clearly against her is that of irreparable harm.

[15] The irreparable harm alleged by Ms. Valastro is that the cormorants that would otherwise nest and breed on Farr Island would lose their habitat. The first point to note is that Ms. Valastro's application is not supported by any expert reports. Her affidavit is replete with opinions about how this Farr Island Project would negatively impact cormorants, none of which are supported by expert opinion. Ms. Valastro is a very knowledgeable citizen, but not a scientist nor an expert.

[16] The evidence before me is that, while the cormorant population in the Great Lakes region was decimated in the 1960s and 1970s (to a low of 135 nests), cormorants have made an amazing recovery. As of 2005, it was estimated that there were about 113,000 nesting cormorants; they are not an endangered or at-risk species. Indeed, the evidence shows that the rapid population growth has resulted in public concerns regarding the impact to the environment.

[17] During her oral submissions, Ms. Valastro agreed that the affected cormorants would disperse to other locations. Ms. Valastro also acknowledges that, because the Farr Island Project would be carried out while the cormorants are wintering elsewhere, no birds would be directly and immediately killed by the submergence of Farr Island. The problem, in her view, is that, absent further study, we do not know where the cormorants will go or whether the cormorants will have an

adverse impact on their new nesting site. Unfortunately, Ms. Valastro has presented nothing beyond speculation that demonstrates that there will be a cumulative negative impact caused by the submergence of Farr Island, and the relocation of the cormorants.

Conclusion

[18] Since either the lack of an underlying proceeding or the failure to demonstrate irreparable harm is sufficient to dispose of this motion, I need not consider any of the other arguments of the HPA. The motion will be dismissed.

[19] The HPA seeks its costs of this motion. At the hearing of this motion, I asked counsel for the HPA to provide me with an estimate of costs. I was advised that the two legal firms involved will bill approximately \$87,000 for this motion. Counsel thought that a \$50,000 award of costs would be appropriate. Costs of \$50,000 to oppose a motion that was clearly without merit are far in excess of any reasonable costs award. In the circumstances and in my discretion, I am not prepared to award any costs to the HPA.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed; and
2. There will be no award of costs.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1468-10

STYLE OF CAUSE: ANNAMARIA VALASTRO v.
THE HAMILTON PORT AUTHORITY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 18, 2010

**REASONS FOR ORDER
AND ORDER:** SNIDER J.

DATED: OCTOBER 19, 2010

APPEARANCES:

Annamaria Valastro FOR THE APPLICANT (SELF-
REPRESENTED)

Mark Abradjian FOR THE RESPONDENT
Renata Kis

Brendan Wong

SOLICITORS OF RECORD:

Annamaria Valastro FOR THE APPLICANT (SELF-
London, Ontario REPRESENTED)

Ross & McBride LLP FOR THE RESPONDENT
Barristers & Solicitors
Hamilton, Ontario