

Injunction to Stop Neighbour's House Construction near Escarpment Dismissed

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A property owner's application for an injunction against his neighbour to stop construction of a property which he claimed was in contravention of municipal and conservation authority regulations was dismissed by the Ontario Superior Court of Justice: *Gobalian v. Poxon*, 2020 ONSC 6750 (CanLII).

The Plaintiff, Gobalian, bought his property for \$440,000 in 2018, and invested a total of \$1.3 million towards building his retirement home. He estimated that he would incur another \$600,000 in development costs before completion.

The Defendant, Poxon, bought the neighbouring land for \$412,000, and began construction of her intended retirement home and a guest house in 2019. Ms. Poxon's husband was the general contractor.

The neighbouring properties abut an escarpment that overlooks Adolphus Reach, a body of water in Prince Edward County, Ontario. Development of land is subject to approval and permits from Prince Edward County and Quinte Conservation Authority.

Gobalian grew concerned with the development going on at the Poxons' land as he believed the main house and guesthouse were being built too close to the escarpment in contravention of the setback requirements in the zoning by-law. He sought intervention by the County and the Conservation Authority to address his concerns but did not receive a satisfactory response. He then commenced an action against Poxon, the County and the Conservation Authority, seeking damages of \$1,000,000.

In August 2020, Gobalian sought an injunction to stop Poxon from continuing with the development and an order requiring her to remove the buildings that were already constructed.

Mr. Justice Patrick Hurley heard the application and addressed whether Gobalian had met the legal requirements for an injunction under the Supreme Court of Canada decision in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), which requires a party seeking an injunction to meet a three-part test:

- First, the court must make a preliminary assessment of the merits of the case to ensure that there is a serious question to be tried.
- Second, the court must determine whether the plaintiff would suffer irreparable harm if the injunction is refused; and
- Third, the court must assess which of the parties would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits at trial.

There was no question that Gobalian had established a serious issue to be tried. Photographs and plans of survey were adduced as evidence, showing that the construction taking place on the Poxon property was within the 15 metre setback and that a deck on the guesthouse, unless it was very narrow, would likely be within the setback. Justice Hurley was prepared to accept that any construction work which was within the 15 metre setback would contravene the permit issued by the Conservation Authority or the zoning by-law.

However, Gobalian did not establish that he (or his property) would suffer irreparable harm if the injunction were not granted. He was not alleging trespass nor private nuisance but rather a concern about the risk of damage to the escarpment generally. Justice Hurley was not persuaded that Gobalian had any evidence of potential harm that could not be rectified through remedial work at his property.

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Lastly, Justice Hurley balanced the interests of the two neighbours and determined that Gobalian would suffer no harm if an injunction is refused. Conversely, the Poxons would suffer serious prejudice if an injunction was granted because they had sold their home in anticipation of completing construction and would not be able to move into their new home if an injunction was granted.

Gobalian also sought an injunction as a "taxpayer" pursuant to section 440 of the *Municipal Act, 2001*, which states:

If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

Based on the evidence filed, however, Justice Hurley was not satisfied that Gobalian had established that the Poxons had breached any by-laws. Both properties fall within the same zone categories in the County's zoning by-law for residential development and environmental protection. The Poxons had proceeded with the construction with the permission and under the supervision of the governing authorities. The municipal building inspector had attended at the Poxons' property on several occasions and approved the construction. Neither the County nor the Conservation Authority alleged that the Poxons had acted in any way contrary to the permits issued to them for the development, nor have they taken any enforcement action under the *Building Code Act, 1992*, the *Municipal Act, 2001*, or the *Conservation Authorities Act*.

Justice Hurley was also influenced by the position of the County and Conservation Authority in the litigation. There was no evidence that they had improperly favoured one neighbour over another; rather, they acted in compliance with their statutory obligations.

As to Gobalian's concern over erosion risk, Justice Hurley noted that the Conservation Authority had issued a permit for the Poxons' construction and was clearly aware of the potential for erosion, identifying mitigation measures that may have to be implemented by the Poxons. Justice Hurley expressed confidence that the Conservation Authority would continue to monitor the situation and ensure that the Poxons do whatever is necessary to diminish any risk of erosion.

To the extent that any erosion resulted from the alleged breach of the setback requirement, that was more appropriately addressed by the Conservation Authority exercising the authority it has to compel the Poxons to implement any necessary remedial measures. As noted by Justice Hurley, "[a]n interlocutory injunction is a much blunter, and less effective, tool to accomplish this."

As a result, Gobalian's application for an injunction was dismissed. The decision reflects the balancing of interests considered by a Court when neighbours feud over construction. It was important for the Court that Gobalian had not clearly established that his neighbours had acted contrary to the by-laws or building permits which had been issued, or that his property was being harmed by the construction. A more general concern over erosion damage is more appropriately left to the applicable Conservation Authority to address.

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