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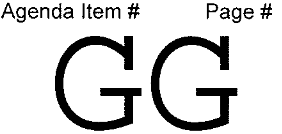

TO:	CHAIR AND MEMBERS, CIVIC WORKS COMMITTEE MEETING ON FEBRUARY 25, 2013
FROM:	JAMES P. BARBER CITY SOLICITOR
SUBJECT	VALASTRO v. THE CORPORATION OF THE CITY OF LONDON - APPLICATION TO THE ONTARIO SUPERIOR COURT OF JUSTICE - COURT FILE NO. 8937-12

RECOMMENDATION

That, on the recommendation of the City Solicitor, the Decision of the Ontario Superior Court of Justice issued on February 4, 2013 in connection with a motion by for an interlocutory injunction to restrain work being done by the Municipality under By-law DR-102-207, **BE RECEIVED**.

PREVIOUS REPORTS PERTINENT TO THIS MATTER

January 14, 2013 – Confidential Report to a Special Meeting of the Civic Works Committee
October 15, 2012 – Report to Planning and Environment Committee – Beaver Management Strategy for Proceeding with Construction of Approved Stanton Drain Remediation Works and Hyde Park Stormwater Management Facility #4
June 19, 2012 – Report to Civic Works Committee - By-law of Abandonment for Identified Sections of the Stanton Municipal Drain
September 26, 2011 – Report to Built and Natural Environment Committee - By-law of Abandonment for Identified Sections of the Stanton Municipal Drain
July 14, 2008 – Report to Environment and Transportation Committee - Notice of Abandonment for Identified Sections of the Stanton Municipal Drain
August 6, 2002 – Report to Environment and Transportation Committee – Municipal Class Environmental Assessment Areas 3 and 6, Hyde Park Development Area
July 29, 2002 - Report to Environment and Transportation Committee – Municipal Class Environmental Assessment Areas 3 and 6, Hyde Park Development Area

BACKGROUND

Summary of Application

On Monday, December 24, 2012, the City was served with an Application Record, seeking, amongst other things, an order quashing By-law DR-102-207, a bylaw to provide for the abandonment of the Stanton Municipal Main Drain, an interim and interlocutory order directing that nothing be done under the said By-law, and an declaration that the Applicant was a public interest litigant and therefore should not be subject to the usual costs rules.

Summary of Interim interim injunction Motion – January 10, 2013

On Monday, January 7, 2013, the City Engineer advised the Applicant's lawyer that Municipal Council authorized the work at its meeting held on December 11, 2012, that the work commenced on December 31, 2012 and that the City engineers will continue with the work as directed by Municipal Council, unless otherwise directed by a court. The City Solicitor's Office successfully defended the Applicant's motion seeking an interim interim injunction to stop any construction work pending the hearing of an interlocutory injunction that was then scheduled for January 24, 2013.

Summary of Interlocutory Injunction – January 24, 2013

On Friday, January 18, 2013, the City Solicitor's Office was served with a supplementary affidavit by the Applicant, a factum of her lawyer and a book of authorities, for the interlocutory

injunction on January 24, 2013, seeking an order to stop construction until the main Application was heard. The City filed a further affidavit of Mr. Braam updating his information as well as the status of the construction work, and a revised factum.

At the motion the Applicant's counsel took the position that (a) Ms Valastro was acting as a public interest litigant and (b) her motion was for a "statutory injunction" to which a lesser legal test applied in order to be successful. The Applicant stated in her affidavit that rather than requiring her to give an undertaking to damages as required by the Rules of Civil Procedure on a motion for an injunction, the City could use its taxing powers if it suffered any damages as a result of the injunction.

Decision – February 4, 2013

In its Decision released on February 4, 2013, a copy of which is attached at Appendix "A", the Court dismissed the motion for an interlocutory injunction. The Court held:

a) that any resident of a municipality has standing: a resident has a "legitimate interest in questioning the legality of a by-law enacted by his or her municipal authority" (paragraph 37);
b) that the balance of convenience favoured the City. The Court specifically rejected the taxation argument:

> As far as "balance of convenience" is concerned, I specifically reject the suggestion, advanced by the Applicant repeatedly in her supplementary evidence, that [the City] really will entail no financial loss through imposition of an injunction, (if later shown to have been inappropriate), because the City can always recoup any such losses "through taxation once the development is completed".
>
> In a very real sense, the City is representative of its residents, and the financial burdens created by municipal expenditure and correlative taxation should not be regarded as separate and distinct. Moreover, taken to its logical extreme the Applicant's suggestion would mean that a public body with tax authority could never establish irreparable financial loss, and therefore could neither seek nor resist request for injunctive relief.
> (paragraphs 46 and 47)

c) and that there is nothing in the relevant legislation that would justify relaxing the requirements of the test for injunctive relief, even when the test has been made for a prima facie case (paragraph 74).

No appeal has been filed in connection with the Decision. The City Solicitor's Office will be filing submissions on costs in response to the invitation of the Court.

PREPARED BY:	RECOMMENDED BY:
[signature]	[signature]
JANICE L. PAGE SOLICITOR	JAMES P. BARBER CITY SOLICITOR

Encl.
cc: Nicole Hall, Solicitor

APPENDIX "A"

CITATION: Valastro v. The Corporation of the City of London, 2013 ONSC 598
COURT FILE NO.: 8937-12
DATE: 2013/02/04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANNAMARIA VALASTRO	Douglas Christie, for the Applicant
Applicant	
- and -	
THE CORPORATION OF THE CITY OF LONDON	Janice L. Page and Nicole Hall, for the Respondent
Respondent	
	HEARD: January 24, 2013

LEACH J.

[1] In formal terms, the Applicant's motion now before me seeks an interlocutory order, pursuant to s.273(4) of the *Municipal Act, 2001*, S.O. 2001, c.25, directing that nothing be done under City of London By-law DR-102-207, (the specifically identified by-law the Applicant seeks to quash through her application), until her application has been adjudicated on the merits.

[2] In essence, however, the Applicant desires an interlocutory injunction restraining substantial ongoing remediation work being carried out by the City in the Hyde Park area of London.

[3] This motion follows the Applicant's unsuccessful previous motion, (brought on an urgent basis on January 9, 2013, and heard and decided by me by way of an extended oral judgment on January 10, 2013, since transcribed), requesting the same relief on an interim basis.

[4] The history and nature of this dispute are outlined in my earlier Reasons for Judgment, but some repetition of that background is advisable.

Municipal Works

[5] The municipal work in question is part of an extensive storm water management project relating to development of the Hyde Park area. It includes the construction of six stormwater management ponds designed to address existing drainage and flood protection deficiencies, and facilitate future development. The work has been carried out in a "phased-in approach", and three of the six contemplated ponds have been constructed since 2002.

[6] The stormwater management work follows years of study and interim steps extending back almost 19 years, including a subwatershed study in 1994, a community plan started in 1997 under the *Planning Act*, and Municipal Council acceptance of an associated Municipal Class Environment Assessment in August of 2002.

[7] One of the many steps taken in furtherance of the ongoing project was formal abandonment, (pursuant to the applicable process required by the *Drainage Act*, R.S.O. 1990, c.D.17), of an existing municipal drain known as "the Stanton Drain". That process was initiated by the City's engineers in 2008, included delivery of notice to 1400 landowners and meetings with those who responded, and culminated in Municipal Council's passage of By-law DR-102-207, formally abandoning the Stanton Drain.

[8] On December 11, 2012, Municipal Council passed a resolution accepting a tendered bid in the sum of $5,719,479.55 to carry out construction of the next phase of the project. Pursuant to those binding contractual commitments, the relevant contractor mobilized workers and equipment.

[9] The relevant work began on December 31, 2012, and has continued since then. A detailed description of the work is set forth in the Respondent's material. It includes substantial protocol development and implementation, extensive finalized and activated subcontractor and supplier commitments, (including special order production of replacement culverts and box culverts already underway), mobilization of a substantial labour force, extensive tree removal and grubbing, clearance of numerous private properties, major excavations, extensive construction of temporary works, (e.g., settling basin, access roads and diversion channel), and production of channel remediation aggregates.

Applicant Opposition to Works

[10] The Applicant, a resident of London, (although she lives in the centre of the City, a considerable distance from the Hyde Park area), believes the area has ecological significance, and is passionately opposed to its development.

[11] She has devoted considerable time, personal expense and effort to the matter; effort which included discussions with the City's engineers and an extended personal review of all Respondent documentation associated with the project.

[12] In the course of that review, the Applicant came across documents which now form the basis of her current application.

[13] In particular, the Applicant now relies upon a Scoped Environmental Impact Study, (the final version of which is dated January 25, 2012), prepared by consultants retained by the City.

[14] According to the Applicant, the report acknowledges that the area in question contains significant natural heritage features warranting its consideration as a "non-development area". In particular, the Applicant says the report confirms that the proposed development would result in the loss of a significant amphibian breeding habitat.

[15] The Applicant also says that the commissioning and receipt of such an Environmental Impact Study should have triggered further opportunities for public participation pursuant to clause 15.5.1(viii) of the City's Official Plan, (adopted pursuant to the *Planning Act*), which reads as follows:

> 15.5.1 (viii) The public, including adjacent property owners, shall be notified of the preparation of an Environmental Impact Study, and given the opportunity to comment. The public notices respecting all Official Plan, Zoning, Subdivision and Site Plan applications shall clearly state whether an associated Environmental Impact Study is being prepared and, if so, that a separate notice of its preparation will be given to the public, including abutting property owners.

[16] The Applicant says that, as the City did not follow its own mandated procedures in that regard before passing its by-law abandoning the Stanton Drain, the by-law is invalid, with the suggested consequence that all work in the area should cease, unless and until the City first revisits and completes the additional public consultation the Application says is required.

[17] In October of 2012, the Applicant provided written and verbal submissions to a City Committee meeting in October of 2012, outlining her opposition to continued development of the area, but achieved no success.

[18] In November of 2012, the Applicant asked the Ministry of the Environment for formal review of the Project, and was refused.

[19] On December 24, 2012, the Applicant served the Respondent with her application record herein requesting relief pursuant to s.273 of the *Municipal Act*, *supra*, which reads in part as follows:

> 273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.
>
> (2) In this section, "bylaw" includes an order or resolution. ...
>
> (4) The court may direct that nothing shall be done under the by-law until the application is disposed of.

(5) An application to quash a by-law in whole or in part ... shall be made within one year after the passing of the by-law.

[20] On January 7, 2013, in response to an inquiry from counsel for the Applicant, the Respondent indicated that, "unless otherwise ordered by a Court, the City's engineers will continue with the Work as directed by Municipal Council".

[21] On January 9, 2013, the Applicant served the Respondent with a motion, returnable the following day on an urgent basis, effectively seeking interim injunctive relief until her solicitor was available to argue a motion for interlocutory relief.

Position of the Respondent

[22] In broad terms, the City says the Applicant not only lacks standing to pursue her application, but that the application itself is fundamentally misconceived and without merit in any event for numerous reasons that include the following:

i. According to the City, if the version of the Official Plan relied upon by the Applicant governs at all, it specifically contemplates satisfaction of desired public involvement and consultation in alternate ways. In particular, the "deeming" provision of clause 15.5.1(vii) expressly indicates that, "When an Environmental Assessment of a proposal is carried out under the Ontario Environmental Assessment Act", (which was done in this case pursuant to the class environmental assessment completed August of 2002), that assessment "will be considered as fulfilling the Environmental Impact Study required by the plan". In other words, the Official Plan itself indicates that the desired level of public consultation has been satisfied in such circumstances.

ii. The City notes that, of all the steps taken in relation to the relevant project, the Applicant has seized on a particular by-law in respect of which the Official Plan has no application. It was *not* a by-law passed pursuant to the *Planning Act*. Rather, it was a by-law passed pursuant to the *Drainage Act*, *supra*, and all requisite procedures required by that legislation were followed. (In particular, the *Drainage Act* is exempt from an environmental assessment under the regulations of the *Environmental Assessment Act*. The City is not required to provide an addendum to an approved municipal class assessment, obtain a certificate of approval from any agency, or prepare an environmental impact study prior to passing a by-law under the *Drainage Act* to abandon a municipal drain; i.e., a man-made conveyance.)

iii. The City emphasizes that the Court's jurisdiction pursuant to s.273(4) of the *Municipal Act* is limited to ordering that "nothing shall be done under the by-law" pending disposition of an application to quash a by-law, and in this case, the relevant work the Applicant wishes to enjoin is *not* being done "under the by-law" that abandoned the Stanton Drain, but pursuant to *other* by-laws, orders and resolutions of the City. The by-law targeted by the Applicant was limited to

formal and instantaneous abandonment of the relevant drain, and effectively was spent the moment it was passed.

[23] For all these reasons and more, the Respondent says the application is doomed to fail on its substantive merits. In the meantime, it opposes the granting of any injunctive relief that would interfere with completion of the works now underway.

Denial of Interim Injunctive Relief

[24] When the Applicant was before me on January 10, 2013, (temporarily without counsel because her lawyer was unable to attend on short notice, to address the Applicant's urgent request for interim injunctive relief), I gave Ms Valastro leave to appear in person for purposes of that hearing, and she argued the motion relying upon material prepared by her counsel.

[25] For the purpose of that hearing, at least, I also was prepared to proceed on the basis that Ms Valastro had sufficient standing to bring her application.

[26] However, I denied the Applicant's request for interim injunctive relief.

[27] I did so based on my belief that the making of orders pursuant to s..273(4) of the Municipal Act should be governed by the well-known approach to interlocutory relief mandated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and my opinion that the Applicant was not able to establish the prerequisites for such relief, having regard to the material then before me.

[28] My reasons in that regard were set out in my extended oral judgment. For present purposes, suffice it to say that, in my opinion:

i. The Applicant had demonstrated the existence of a "serious question to be tried", within the meaning of the applicable test. In particular, despite the flaws in reasoning suggested by the City, which eventually might warrant a substantive ruling in the City's favour when the application is determined on its merits, the Applicant's intended arguments could not properly be characterized as "frivolous or vexatious". They were, rather, principled arguments advanced with the assistance of counsel, based on a not fanciful characterization of the effect of the by-law in question and an exercise in legislative interpretation that was at least arguable as a matter of first impression.

ii. The Applicant's evidence of "irreparable harm" that she would sustain, in the absence of an injunction, nevertheless seemed amorphous and inadequate. In particular, I was prepared to accept that effective frustration of an important intangible right, (such as the right to be heard in a timely fashion, in a wider public forum such as that arguably contemplated by the City's own Official Plan), was a loss not easily quantifiable in monetary terms, and therefore in the nature of a principled loss suggestive of "irreparable harm". In practical terms, however, the Applicant's evidence and submissions made it clear that the suggested loss of a right to be heard really entailed irreparable consequences only because of what

supposedly would be destroyed and lost forever, in physical terms, pending determination of the Application. In that regard, the only irreparable loss suggested by the Applicant was alleged irrevocable destruction of a significant amphibian breeding habitat if the remedial work was allowed to continue. Yet it seemed to me that the evidence of such destruction, (based entirely on the Applicant's lay interpretation of the report prepared by the Respondent's consultant), was tenuous at best – given my review of the material in the time permitted by the Applicant's urgent motion.

iii. On any objective view, evidence of the extensive detrimental impact on the City via the granting of any injunctive relief at this point tilted the "balance of convenience" scale firmly in the Respondent's favour. In that regard, uncontradicted evidence tendered by the City confirmed that any temporary cessation of the remedial work would entail very substantial financial cost, having regard to the extraordinary and time-sensitive financial obligations already undertaken by way of contract and subcontracts, and the extensive additional work that would be required to stabilize an otherwise fluid and temporary situation. At the time of the earlier hearing before me, the estimated costs in that regard were estimated to be approximately $1,650,000.00. However, that figure was likely to escalate dramatically if a "stop work" order delayed completion of the contemplated work beyond the relatively narrow window of construction opportunity permitted by associated authority granted by the Department of Fisheries. Although no formal undertaking as to damages had been offered by the Applicant, (and I accepted that the court's equitable discretion permitted waiver of the undertaking requirement in appropriate cases), it was not disputed that such an undertaking would have no practical value in any event, having regard to the Applicant's professed limited means. In the result, the Respondent would have no effective ability to recover such losses from the Applicant in the event injunctive relief was granted but the Applicant's arguments proved to be unsuccessful.

[29] I therefore rejected the request for interim injunctive relief, without prejudice to the Applicant's possible request for interlocutory injunctive relief, possibly based on additional evidence.

[30] That request is the one before me now. (In that regard, it should be emphasized that the substantive merits of the application are not before me for determination. In the present context, I am simply being asked to address the Applicant's request for interlocutory injunctive relief until such time as the application is heard and determined, at some later date which has not yet been scheduled.)

Analysis – Current Request for Injunctive Relief

[31] At the return of the Applicant's latest motion, the Respondent formally renewed its objection based on the Applicant's alleged lack of standing, and I therefore turn first to that threshold issue.

[32] As noted above, for purposes of the earlier hearing, I was content to regard the Applicant as having sufficient standing to advance her arguments for interim relief.

[33] I did so based on comments by the Court of Appeal in *Galganov v. Russell* (2012), 293 O.A.C. 340 (C.A.), in which the Court expressly considered the scope of litigants contemplated by the term "any person" used in s.273(1) of the *Municipal Act, supra*; i.e., the provision indicating that the Superior Court of Justice had authority to quash a by-law of a municipality for illegality, and grant corresponding relief pursuant to s.273(4), "upon the application of any person".

[34] In that case, the Court of Appeal noted how the wording of s.273(1) previously had limited use of the section to "a resident of the municipality", but recent legislative amendments had employed the "broader, more inclusive phrase" of "any person" to reflect "the more general trend of broadening access to justice in the courts". The Court went on to emphasize that this did not eliminate the courts' ability to refuse standing in the absence of a suitable "connecting factor" between a proposed litigant and the substantive matters to be put in issue.

[35] For present purposes, however, the important point is that simple residence within a municipality may no longer be a *necessary* condition for standing pursuant to s.273(1), but it continues to be a *sufficient* basis for standing under the "broader, more inclusive" wording. This was made clear by the comments at paragraph 15 of the *Galganov* decision, where Weiler J.A., speaking for the Court, said this:

> That said, although s.273(1) no longer specifies one or more categories of persons who can challenge a by-law, I do not take the legislature to have eliminated the principled exercise of judicial discretion respecting standing. *The existence of a connecting factor, such as residency*, owning property in the municipality and therefore being a ratepayer, being affected by a by-law, or having a specific interest in a by-law, can still be required before a challenge to a by-law will be allowed to proceed.
>
> [Emphasis added.]

[36] At the earlier hearing before me, I deferred final determination of the standing issue pending more fulsome argument of the point when both parties were represented by counsel.

[37] However, nothing submitted during the latest hearing altered my preliminary view that Ms Valastro has standing to bring her application pursuant to s.273, with associated requests for interim relief. She may not live in the immediate vicinity of the area in question, but she unquestionably is a resident of London. In my view, (supported by the *Galganov* decision), any resident of a municipality had a legitimate interest in questioning the legality of a by-law enacted by his or her municipal authority.

[38] My analysis therefore proceeds to consideration of the Applicant's renewed request for injunctive relief.

[39] In that regard, although both parties filed supplementary motion records prior to return of the latest motion, I am not persuaded that anything material has changed that would alter the outcome of the *RJR-MacDonald* analysis outlined above.

[40] To the contrary, it seems to me that further reflection and review of the additional evidence reinforce my preliminary conclusion that the Applicant has not established all three prerequisites of the *RJR-MacDonald* test in the circumstances before me.

[41] As far as the "irreparable harm" requirement is concerned, the Applicant continues to rely on alleged impairment of the public hearing and participation rights which, (according to her substantive argument), were contemplated and mandated by provisions of the City's Official Plan. In terms of what might be forever lost through delayed vindication of that right, the Applicant's evidence essentially continues to rely principally, if not exclusively, on the alleged destruction of a significant amphibian breeding habitat. In that regard, her evidence still is limited to her lay interpretation of the Scoped Environmental Impact Study prepared by the Respondent's consultant, the final version of which is dated January 25, 2012.

[42] However, a more thorough review of that report suggests, I think, that its authors by no means shared the appellant's view of the harm that might be inflicted on the relevant amphibian breeding habitat if the contemplated remedial works were allowed to proceed.

[43] In particular, on p.43 of the report, (at s.8.2.1.7 addressing "Terrestrial Compensation"), I note the following comments:

> This area displaced also removes *some* habitat considered provincially significant in terms of Amphibian breeding. Amphibians were not concentrated just within the area allocated for the SWM facility, *but throughout the area.* The sheer number of amphibians heard calling and observed is an account of the diversity of habitat found *throughout the overall area,* not just the swamp thicket within the area of the SWM facility. The loss of the 1.04ha of wetland area *accounts for less than 10% of amphibian habitat throughout the total surrounding area.*
>
> Considering these conditions, the 1.04ha of wetland area lost contains the following:
>
> - *Less than 10% of the amphibian habitat for species within the surrounding area* (i.e., the American toad, Green frog, Leopard frog);
> - Low quality wetland habitat that has *likely established itself within the last 10 years*;
> - Presence of common vascular plant species.
>
> In light of these conditions, compensation should be implemented through the detailed design of the remediation and SWM works *to replace any removed habitat* within the area.

[Emphasis added.]

[44] In my view, an objective reading of the report, taken as a whole, simply does not support the Applicant's suggestion of irreparable harm in terms of lost amphibian breeding habitat, (which in turn would establish irreparable consequences flowing from deferred vindication of the public's "right to be heard" pursuant to the Official Plan).

[45] To the contrary, the authors of the report clearly seem to indicate that the contemplated remedial works will entail only a relatively modest and temporary impact on the relevant overall breeding habitat. In particular, a relatively small percentage of the habitat will be lost only until its later replacement, at which time that replacement area probably will be repopulated in the same manner as the current overall habitat came to be populated over the past ten years.

[46] As far as "balance of convenience" is concerned, I specifically reject the suggestion, advanced by the Applicant repeatedly in her supplementary evidence, that the Respondent really will entail no financial loss through imposition of an injunction, (if later shown to have been inappropriate), because the City can always recoup any such losses "through taxation once the development is completed".

[47] In a very real sense, the City is representative of its residents, and the financial burdens created by municipal expenditure and correlative taxation should not be regarded as separate and distinct. Moreover, taken to its logical extreme, the Applicant's suggestion would mean that a public body with tax authority could never establish irreparable financial loss, and therefore could neither seek nor resist requests for injunctive relief.

[48] Beyond this, the supplementary evidence tendered by the City indicates that the consequences of injunctive relief have escalated since the time of the previous hearing. In particular, the City's exposure to increased costs resulting from any "stop work" order at this point, (for the reasons outlined above), is now thought to exceed $3 million. Moreover, prolonged or repeated extension of road closures, in the area of Gainsborough Road, would entail significant expense and profound detrimental impact on local businesses and residents.

[49] In short, the "balance of convenience" now tilts even more firmly in favour of the City and refusal of the requested injunctive relief.

[50] In the course of argument, counsel for the Applicant effectively conceded these financial realities, but questioned how any normal resident of a municipality, without the personal means to make good on any undertaking to provide reimbursement for the extraordinary costs usually associated with such municipal undertakings, could ever hope to satisfy the "balance of convenience" requirement and enjoin such activities.

[51] While such concerns have merit in the abstract, I agree with the Respondent's submission that, in the case before me at least, such arguments lose their force when one has regard to considerations of timing.

[52] In particular, the vast majority of the irreparable harm now relied upon by the City, in its "balance of convenience" arguments, stems from the fact that it has committed itself

contractually, financially and physically to the remedial works in question. Had Ms Valastro come before the court requesting an injunction *before* Council committed itself to the tender, or *before* the construction juggernaut had been set in motion, the balance of convenience considerations may have been very different.

[53] As matters stand, application of the *RJR-MacDonald* analysis, based on the evidence now before me, once again indicates that injunctive relief should be denied.

[54] Counsel for the Applicant did not seriously or strenuously question or challenge that suggested conclusion. Instead, he suggested that the *RJR-MacDonald* analysis simply did not apply to this situation.

[55] In particular, relying upon certain passages from *Ontario (Minister of Agriculture and Food) v. Georgian Bay Milk Co.*, [2008] O.J. No. 485 (S.C.J.), ("Georgian Bay Milk"), the Applicant argues that a significantly different test applies to requests for injunctive relief permitted by specific statutory provisions, (a "statutory injunction"), and that this different test effectively dictates that injunctive relief should be granted in this case, as requested by the Applicant.

[56] In *Georgian Bay Milk*, the Ministry of Agriculture and Rural Affairs (the "Minister") and the Dairy Farmers of Ontario ("DFO" sought injunctive relief preventing various milk producers from marketing and transporting milk "contrary to the clear requirements of the law governing the marketing and sale of milk in Ontario". In that regard, injunctive relief was sought not only pursuant to s.101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended, but also pursuant to s.22 of the *Milk Act*, R.S.O. 1990, c.M-12, which reads in part as follows:

> *Where it is made to appear from the material filed or evidence adduced that any offence against this act or the regulations ... has been or is being committed,* the Superior Court of Justice may, upon the application of the Commission, the Director or a marketing board, *enjoin* any transporter, processor, distributor or operator of a plant, absolutely or for such period as seems just, and any *injunction* cancels the licences of the transporter, processor, distributor or operator of a plant named in the order for the same period.
>
> [Emphasis added.]

[57] In the course of his reasons in *Georgian Bay Milk*, Justice Pattillo expressly applied the *RJR-MacDonald* analysis to some of the requests for injunctive relief, but noted that different considerations applied in relation to injunctions sought pursuant to statutory provisions such as those in s.22 of the *Milk Act*, *supra*. In particular, at paragraphs 50-51 of his decision, Justice Pattillo summarized the relevant authorities as follows:

> There is, however, a significant distinction between an injunction authorized by statute and an injunction available to the attorney general at common law. ...
>
> On the basis of the authorities cited by the parties I am satisfied that where a statute provides a remedy by way of injunction, different considerations govern

the exercise of the court's discretion than apply when an attorney general sues at common law to enforce public rights. The following general principles apply when an injunction is authorized by statute:

i. *The court's discretion is more fettered. The factors considered by a court when considering equitable relief will have a more limited application.* ...

ii. Specifically, *an applicant will not have to prove that damages are inadequate or that irreparable harm will result if the injunction is refused.* ...

iii. There is no need for other enforcement remedies to have been pursued. ...

iv. The court retains a discretion as to whether to grant injunctive relief. *Hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed.* However, an injunction will not issue where it would be of questionable utility or inequitable. ...

v. It remains more difficult to obtain a mandatory injunction.

[Emphasis added.]

[58] Relying on the emphasized portions of the above comments, counsel for the Applicant submits that, in the case before me, the Applicant's reliance on s.273 of the *Municipal Act* reduces or eliminates the barriers to injunctive relief that otherwise might be suggested by application of the "normal" *RJR-MacDonald* analysis.

[59] In particular, counsel for the Applicant submits that she has satisfied the "serious question to be tried" test, (as per my earlier ruling), and that the express statutory basis for the underlying application then makes it:

a. unnecessary for the Applicant to lead evidence establishing that she will experience irreparable harm if the injunction is not granted; and

b. inappropriate to conclude that the public's interest in law enforcement is outweighed by any threatened financial hardship to the City, stemming from imposition of an injunction.

[60] With respect, I think the comments of Justice Pattillo regarding the principles applicable to granting a "statutory injunction" must not be taken out of context, and that the Applicant's reliance on them in the case before me is fundamentally misconceived.

[61] In my opinion, the three-stage analysis mandated by the Supreme Court of Canada in *RJR-MacDonald* is a carefully crafted equation that balances competing interests, and must be viewed as a unified whole. In particular, it offsets avoidance of a detailed and aggressive inquiry into the substantive merits of a dispute in the "first stage" of the inquiry by imposition of a requirement that the party seeking an injunction establish that he or she will establish

irreparable harm, as well as an effective requirement that any such irreparable harm outweigh that threatened to the respondent if the injunction is granted.

[62] That careful balancing exercise obviously would be completely and inevitably skewed in favour of those seeking an injunction if one preserves and applies only one element of the *RJR-MacDonald* equation, (i.e., satisfaction of the substantively relaxed "serious question to be tried" test), while effectively eliminating any need to satisfy the second and third elements of the test. In effect, so long as a litigant could establish that his or her claim was not "frivolous or vexatious", an injunction would be available largely on demand.

[63] I certainly agree that there are situations where applicable legislation effectively may result in a departure of the "normal" analysis suggested in *RJR-MacDonald.*

[64] Indeed, the possibility of an express statutory deviation from the rules "normally" applicable to injunctions and stays was expressly acknowledged by the Supreme Court of Canada in the *RJR-MacDonald* decision itself, at paragraph 46, where it expressly quoted from its earlier decision in *A.G. Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at p.127:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. *In the absence of a different test prescribed by statute,* they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stays the principles which they follow with respect to interlocutory injunctions. [Emphasis added.]

[65] However, as this comment suggests, the relevant emphasis is on effective legislation of a different statutory *test* for the injunction, which in my opinion is something conceptually and fundamentally distinct from situations where legislation merely makes reference to the possibility of injunctive relief without specifying or suggesting a different test for the granting of such relief.

[66] In that regard, I think the Applicant's argument pays insufficient regard to what usually is contemplated by the term "statutory injunction".

[67] In particular, the term usually is employed in relation to situations where the state seeks an injunction to enforce public rights. See, for example, Sharpe, *Injunctions and Specific Performance*, at chapter 3, dealing with injunctions at the suit of the Attorney General to restrain open contraventions and defiance of legislation, public nuisance, statutory prohibitions, dangers to public safety, etc., especially in situations where there has been a clear contravention of legislative provisions.

[68] It is not unusual in such situations for the Legislature to alter, in effect, the usual balancing equation underlying an approach to requests for injunctive relief; e.g., by suggesting that injunctive relief should be granted more readily where the circumstances clearly indicate a *prima facie* merits analysis favouring the state.

[69] In such cases, "the legislative authority is presumed to have taken into consideration the various competing interests of the public in enacting the legislation which is being contravened; the public has a direct and substantial interest in the enforcement of the law; and open defiance of the law constitutes irreparable harm to the public interest"; see *Vancouver (City) v. Zhang*, [2009] 8 W.W.R. 713 (S.C.), at paragraph 18.

[70] Similarly, "despite the absence of actual or threatened injury to persons or property, the public's interest in seeing the law obeyed justifies equitable intervention where the defendant is a persistent offender who will not be stopped by the penalties provided by statute"; see Sharpe, *supra*, at p.3-12.

[71] Indeed, an example of a "true" statutory injunction is provided in *Georgian Bay Milk* itself, where the express provision for injunctive relief is conferred by s.22 of the *Milk Act*, *supra*, to enjoin conduct "where it is made to appear ... that any offence ... has been or is being committed". This expressly permits exploration of the substantive merits of a situation before the court, (not something normally permitted by the *RJR-MacDonald* approach). Where that exploration in turn suggests clear contravention of legislation, it obviously makes sense to alter the remaining components of the "injunction equation" by relaxation of the normal "irreparable harm" and "balance of convenience" requirements.

[72] But that is not the sort of situation in which the Applicant advances her request for injunctive relief.

[73] In particular, the underlying legislation in the case before me is s.273 of the *Municipal Act*, *supra*. In very broad terms, that legislation addresses "law enforcement" only insofar as it contemplates the possibility that an allegedly illegal municipal by-law may be struck down after a merits inquiry; i.e., the court "*may* quash a by-law in whole or in part for illegality", and has a discretion as to whether interim orders should be granted directing that nothing be done under the relevant by-law "until the application has been disposed of".

[74] This is a far cry from the sort of situation normally contemplated by reference to a "statutory injunction". In particular, I see nothing in the relevant legislation that suggests any kind of *prima facie* merits determination that would justify relaxation of the remaining components of the "normal" test for injunctions suggested by *RJR-MacDonald*.

[75] In my opinion, the applicable test for determining the Applicant's request for injunctive relief is that set out in *RJR-MacDonald*, and that test is not satisfied for the reasons set out above.

Disposition and Costs

[76] For the above reasons, the Applicant's motion for interlocutory relief, i.e., an interlocutory order pursuant to s.273(4) of the *Municipal Act*, is dismissed.

[77] Because my decision was reserved, the parties were unable to make any submissions regarding costs of the Applicant's latest motion.

[78] If the parties are unable to reach an agreement on costs in that regard:

a. the Respondent may serve and file written cost submissions, not to exceed five pages in length, (not including any bill of costs), within two weeks of the release of this decision;

b. the Applicant then may serve and file responding written cost submissions, also not to exceed five pages in length, within two weeks of service of the Respondent's written cost submissions; and

c. the Respondent then may serve and file, within one week of receiving any responding cost submissions from the Applicant, reply cost submissions not exceeding two pages in length.

[79] If no written cost submissions are received within two weeks of the release of this decision, there shall be no costs of the Applicant's motion for an interlocutory injunction.

Justice I.F. Leach
Justice I. F. Leach

Released: February 4, 2013