

Case Name:

Muskoka Lakes (Township) v. Ontario (Minister of Natural Resources)

Between

**The Corporation of the Township of Muskoka Lakes,
Applicant, and
Her Majesty the Queen in Right of Ontario as represented by
the Minister of Natural Resources and Swift River Energy
Limited, Respondents**

[2013] O.J. No. 3856

2013 ONSC 5380

231 A.C.W.S. (3d) 1095

13 M.P.L.R. (5th) 251

35 R.P.R. (5th) 70

2013 CarswellOnt 11719

Divisional Court File No. 202/13

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

D.R. Aston, I.V.B. Nordheimer and P.M. Perell JJ.

Heard: August 19, 2013.

Oral judgment: August 19, 2013.

Released: August 22, 2013.

(9 paras.)

Counsel:

Harold G. Elston and Aynsley L. Anderson, for the Applicant.

Ronald E. Carr and Eunice D. Machado, for the Respondents, Her Majesty the Queen in Right of Ontario.

Neil R. Finkelstein, Eric S. Block and Shane C. D'Souza, for the Respondents, Swift River Energy Limited.

The judgment of the Court was delivered by

1 I.V.B. NORDHEIMER J. (orally):-- The Township of Muskoka Lakes brings this application for judicial review through which it seeks various forms of relief, the effect of which would be to stop the Provincial Government's plans through the Ministry of Natural Resources, to lease certain Crown lands that exist on Burgess Island in the Muskoka Lakes area to the respondent Swift River Energy. It is part of these plans that Swift River would construct a hydro-electric facility on the Crown lands where two waterfalls and two dams already exist. The Township's expressed objectives in bringing this application are to ensure that the Government's plans for the construction of this hydro-electric facility do not inhibit public access to the waters off of the lands and to ensure that a claimed portage over the lands is preserved. There does not appear to be any dispute that the effect of the remedies sought by the Township would be to preclude the construction of the hydro-electric facility, at least as it is currently contemplated.

2 In my view, this application cannot succeed. Under s. 28 of the *Public Lands Act*, R.S.O. 1990, c. P.43, the Ministry may prohibit the possession, occupation or use of public lands. Pursuant to that authority, the Ministry has issued a Notice that prohibits any public access to the Crown lands that are at the heart of the issue in this application. The Ministry made that determination because of expressed concerns about public safety and after commissioning a Public Safety Measures Plan. These safety concerns have existed at least since 2009 when there was a double drowning in the waters off of these lands.

3 The Township suggests that the use of s. 28 by the Ministry is, in essence, simply a disguised attempt to thwart the Township's efforts to maintain the portage on the Crown lands pursuant to s. 65(4) of the *Public Lands Act* and to maintain public access to the waters off of these lands pursuant to s. 3 of the *Act*. The Township also submits that the decision to issue a Notice under s. 28 was unreasonable because there were other means to address any safety issues short of a complete ban on public access to the Crown lands.

4 In my view, the Township has failed to establish that the Ministry's decision to issue a Notice under s. 28 was unreasonable such that it could invoke our right to interfere with it under the court's judicial review authority. There can be no reasonable dispute that there are safety issues concerning these lands that include rapids, waterfalls and dams among other hazards. It may be that there were

other alternatives to address those safety concerns but the fact that the Ministry chose between different options does not constitute their decision to adopt one option over another as unreasonable. In particular, a complete ban on public access to the Crown lands, in circumstances where two people have already lost their lives, cannot be shown to be so manifestly unreasonable as to justify interference by this court. I would add that there is also insufficient evidence that the s. 28 Notice is being used as a guise to advance the Government's desire to ensure that a hydro-electric facility is constructed on these Crown lands. While that may ultimately be a result of the Notice, there is a difference between a consequence of a decision and the objective of a decision.

5 There is a companion submission that s. 28 should not be allowed to thwart the legislative directives contained in other sections of the *Public Lands Act* such as the two sections that the Township relies on, namely, s. 65(4) dealing with portages and s. 3 dealing with public access. There is nothing in the legislative scheme that suggests that s. 28 is to be so restricted. The section is not made subject to any other provision of the *Act* nor are the two sections upon which the Township relies expressly stated to prevail over s. 28. Indeed it would seem that s. 28 might be designed expressly for a situation such as appears here where, despite the Government's policies to protect portages and public access to bodies of water, other pressing concerns dictate that those policies must be rendered subservient to those other pressing concerns. Public safety is an objective that will often trump other policy goals.

6 Consequently, I see no basis for this court to interfere with the Notice made under s. 28.

7 While that is sufficient for the purposes of disposing of this application, I would add the observation that I have considerable difficulty with the submission that the words "sold or otherwise disposed of" in s. 65(4) should be interpreted to include a lease of Crown lands. I do not see anything in the *Act* itself that would suggest such an interpretation. Indeed the contrary is demonstrated since many sections of the *Act*, including ss. 65(1) & (2) themselves, expressly use the term "lease". If it had been the intention of the Legislature that a lease of Crown lands would constitute a disposition for the purposes of the protections afforded by s. 65(4), it would have been a simple matter for the Legislature to have included the term "lease" within that section as it did with ss. 65(1) & (2).

8 In light of my conclusions, it becomes unnecessary to address the various other issues raised in the application. The application for judicial review is dismissed.

9 The Township has agreed to pay costs to Her Majesty The Queen in the amount of \$17,000, all inclusive. There are no costs between the Township and Swift River Energy Limited based on agreement between the parties.

I.V.B. NORDHEIMER J.
D.R. ASTON J.
P.M. PERELL JJ.

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