2016 March 21 Circle of All Nations/Asinabka Note re Chaudiere Divisional Court

2016 March 21 Circle of All Nations Note Regarding the March 9, 2016 Request to Appeal Motion presented before Justice Charles Hackland:
Re: City of Ottawa/Ontario Municipal Board Case Number PL 141340

Overview

This note provides a brief overview of Divisional Court proceedings in the challenges of development and the rezoning of lands from public to private at the Sacred Chaudiere Site in Ottawa, and the request for leave to appeal the Ontario Municipal Board (OMB) decision to Dismiss Appeals in this case; and in view of the arguments presented by the City of Ottawa and Developer that the Court cannot intervene with respect to Constitutional arguments in these OMB matters, and their reiteration of misrepresentative, misleading or false information, we re-present Circle of All Nations grievances for the public record.

In this regard, we note that the OMB failed to address our challenges because, though we were instructed to present hard copies of our documents at the hearing, in fact, the Chair dismissed them, noting in his November 17 2015 decision that they were not presented as an "affidavit". Hence we maintain that these grievous matters remain unaddressed at the administrative and legal levels and warrant public and political attention.

Thus I draw your attention specifically to **Section III. Circle of All Nations challenges** …. on pages 4 – 7 of this document.

Subject

Request for Leave to Appeal the final decision of the Ontario Municipal Board (OMB) dated November 17, 2015 to dismiss appeals of City of Ottawa rezoning and planning decisions at Chaudiere and Albert Islands at the Sacred Chaudiere Site, within the heart of unceded, unsurrendered and unconquered territory of the Algonquins of the Ottawa River Watershed, (formally contested in September, October and November, 2014), and heard by Judge Hackland at Ontario Divisional Court, Ottawa, Canada on March 9, 2016.

Background

Originally, five appellants, including Romola V. Trebilcock Thumbadoo and Dan Gagne, representing Circle of All Nations, founded by Late Algonquin Elder Dr. William Commanda, OC, Douglas Cardinal, Lindsay Lambert, Larry McDermott and Richard Jackman, appealed the City of Ottawa's rezoning and planning decisions. Key related Circle of All Nations documents are available for public review in the Documents Page of www.asinabka.com.

On December 2, 2015, Romola V. Trebilcock/Thumbadoo, Daniel Gagne and Larry McDermott jointly filed notice of motion for leave to appeal to Ontario Superior Court of Justice – Divisional Court, Ottawa.

Separately, (but related), the three appellants also requested a review of the OMB Chair's decision of November 17, 2015, based on errors in law including correctness of law and violation of a reasonable standard, consistent with the Ontario Provincial Policy Statement amended April 2014. On February 3, 2016, the OMB dismissed the appeal.

In December appellants unified efforts in the Request for Leave to Appeal, together with Douglas Cardinal and Richard Jackson, with Michael Swinwood as counsel. This request was heard by Judge Hackland. The parties had agreed that the appellants would present their case first; then the City and Developers, theirs; and then appellants would close. The Judge intervened with a few questions/comments.

The Motion Record included three factums: September 3, 2015; January 20, 2016, and February 19, 2016.

Peripheral issues indicative of the dynamics of the engagement included the request for personal costs against the appellants' counsel, for which challenge another lawyer had to be engaged; this was withdrawn. The Judge noted that the OMB Chair objected to late submission of a motion by the appellants' counsel, but was prepared to grant an extension to the City. It is also noted that recording of the OMB proceedings was strongly prohibited.

Arguments

Official Proceedings

I. Argument of Counsel for the Appellants

Here is a brief summary of the key points raised by Michael Swinwood, counsel for the appellants. He took the position of setting the contextual issues in the challenge of land usage at a Sacred Indigenous site, noting in the context of Constitution, the Charter of Rights and Freedoms, Ontario Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Provincial Policy Statement provisions,

- a long history of grievances;
- indifference of governments
- roughshod treatment of Indigenous peoples and complete lack of respect, misunderstanding and misrepresentation;
- silencing of the Indigenous peoples and voice, when they are making a case on critical matters;
- approaches contrary to any commitment to reconciliation;

and, challenging the decision to quash the Constitutional Question as an error in law that foreclosed discussion of critical matters, including regarding unpatented crown land held in trust, and argued that these issues merited the attention of Divisional Court.

He also argued the implications of recent Ontario Labour Board and Tsilhqo'tin Supreme Court decision for presentation of the Constitutional Question, in particular with respect to Indigenous laws, practices, customs and traditions; the obligation to consult with Indigenous Peoples; and noted the multiply constituted Algonquin communities and interests; he also challenged the City's and National Capital Commission's delegation of the Crown's duty to consult to developers. His supplementary factum addressed Constitutional provisions with respect to this historically and nationally acknowledged Sacred Site, and he referenced the evidentiary material in the 2015 archeological report of Boswell and Pilon. He challenged the OMB's dismissal of the affidavit of internationally recognized Indigenous Architect Douglas Cardinal, multiply engaged as Indigenous community planner, and Anishinabe Elder, Pipe and Sweat Lodge keeper. He noted the rights and place of traditional elders and peoples in negotiations of discussions on land based matters on unceded, unsurrendered, unconquered Algonquin territory; and rights of access to sacred and ceremonial lands of all Indigenous peoples (note that year long ceremony is being conducted on the land at this moment, affirming its present day relevance); and noted further that Band Chiefs, as agents of Indian Affairs and thus government, represent only one spectrum of Indigenous interest, and the group the City and Developers identify as peoples consulted comprise Algonquins of Ontario, and not the Algonquins *in* Ontario (and by extension, of Quebec). With respect to the UNDRIP, he challenged arguments that this was merely an aspirational document, noting that as signatory to this international agreement, Canada has a responsibility to ensure its place in domestic law.

Finally, he argued that the selective inclusion of certain material and ignoring and silencing of other material by the OMB Chair, in the management of the hearing and in his decision of November 17, 2015, dismissive of critical provisions of the mechanisms referred to above, and in particular the Charter and the Provincial Policy Statement, confirmed that the Chair erred in law in dismissing consideration of critical Indigenous constitutional rights issues.

II. Arguments of the City of Ottawa and Developer

Legal counsel for the City and Developer argued that the constitutional question was beyond the responsibilities and scope of the OMB. (In this regard, note this statement in the December 11. 2014 instruction from the OMB: *Also the Board notes that some of the basis for the appeals made by the appellants concerns First Nation persons rights under the Constitution Act. The appellants should be prepared to argue their position by motion if required.)* Presentations addressed the question of items of mixed fact and law, and counsel suggested there were therefore limits to what the Judge could legitimately address in this case. They noted differences between questions of law and matters of public importance. They noted the limited capacity of tribunals like the OMB to address Aboriginal issues, and pointed out that judicial challenge of the OMB decision could

result in multiple other OMB challenges. They (erroneously and misleadingly) challenged expectations that the OMB had any *Duty to Consult*, noting that no such duty was imposed on it. In essence, they were demarcating limits to the Judge's capacity to intervene in this case.

In addition, they repeatedly affirmed four key points pertaining to legitimacy of Algonquins of Ontario, overall consultation private land ownership, and brownfields.

City counsel confirmed that they delegated responsibility to consult to the developer, who was also advised to engage with Algonquins of Ontario by the City, ascribed legitimacy as the voice of all Algonquins in view of their engagement in land claim negotiations with the federal and provincial governments; further they suggested appellants had opportunity to provide input to the developer. They applauded the overall consultation process and statements of support. They repeatedly noted the lands were held under private ownership for over 100 years. They noted further brownfield rehabilitation as a public service being provided by the developers at the Chaudiere Site.

III. Circle of All Nations challenges of the positions of the City of Ottawa and Developer, beyond the critically important issues raised via the Constitutional lens

Post Hearing Commentary
NOTE THAT THE COMMENTARY BELOW CHALLENGES THE SUBMISSIONS OF THE CITY OF OTTAWA AND THE DEVELOPER PRESENTED TO JUSTICE HACKLAND ON MARCH 9, 2016; since this is not part of the court discussions and therefore the transcripts, it is noted here for our records and for public information.

1. a) Algonquins of Ontario, Algonquins and the Duty to Consult

Noting that this is the unsurrendered, unceded and unconquered territory of the Algonquins of the Ottawa River Watershed, and further, that the City itself endorsed and legitimized the Legacy Vision for the Sacred Chaudiere Site as presented by Elder William Commanda from Maniwaki, Quebec (November 2011), we question the contention that Algonquins of Ontario (AOO) are the sole legitimate group for consultation on this singular geologically, culturally, historically significant Indigenous Sacred Waterfall Site in the Capital City and within the National Capital Region.

But even within this context, we note that Elder Commanda consulted with the AOO, on several occasions, from the early 2000s (photographs and documentary evidence available); that documents of the AOO confirm repeatedly support for his vision (see excerpts below), that a Windmill Memorandum of Understanding with Algonquins of Pikwakanagan was only developed during the course of the challenge of the City's decision to rezone Chaudiere and Albert islands to permit privatization and mixed use development (April 2015) and then later with the Algonquins of Ontario (August 2015); indeed these two separate processes, undertaken against a bigger backdrop of extensive and continuing contention and fragmentation on the land negotiations table, are indicative

of the flawed and misrepresentative nature of the AOO support argument presented by the City and Developer.

Finally, it is also noted that the Motion to Dismiss materials themselves specifically and repeatedly reflect the *Algonquin representatives'* desire to protect the William Commanda vision (expressed in writing by the Algonquins of Ontario); this attests to conflictual approaches, representations, decisions and actions on this file amongst the Algonquin of Ontario team players.

Further aspirational documents from the Algonquins of Ontario to City of Ottawa and National Capital Commission in late 2010 reflect original intentions to advance the comprehensive vision per Creative Community Prosperity initiatives, till adversely impacted by the Developer's project of 2013 (documents available/Circle of All Nations Files and Records).

1. b) Constitutional duty to consult

We assert that the OMB erred in law to exercise its constitutional responsibilities by finding that consultation with the Algonquins was the type of consultation that is customary and contemplated under the Provincial Policy Statement as well as under the City's Official Plan; the creation of the reserves of Kitigan Zibi, Temascaming, and Golden Lake/Pikwakanagan prior to the creation of Canada, Ontario or Quebec attests to the presence of Algonquins on both sides of the Ottawa river and necessitates comprehensive consultation with the multiple Algonquins across both Quebec and Ontario;

Further, we assert that the OMB erred in law by concluding that the spirit and intent of the policies in the City's Official Plan directed at working with the Indigenous Peoples (First Nations, Inuit and Metis) on planning for high profile public lands already endorsed by the City of Ottawa (Nov 19, 2010) for a *national* Indigenous centre, have been respected through the planning process for determining the future development for the islands;

1. c) Delegation of the Duty to Consult

We maintain it was a serious error in law for the City to delegate its responsibility to consult to developers in this singular geologically, culturally, historically significant Indigenous Sacred Waterfall Site in the Capital City and within the National Capital Region.

The same concern applies to actions of the National Capital Commission (NCC) with respect to the crown's responsibility in consultation, and we note the NCC written admission of conflict of interest concerns with respect to the relationship of its own consultant and the Developer's Aboriginal support team member.

2. Consultation

We maintain the OMB erred in the assessment of consultation process in view of fact that the contested public lands lie within the National Capital Region, for which the public at large, over the coursed of a decade, had engaged in developing a fully inclusive Legacy Vision already supported by the federal government (Department of Canadian Heritage, 2004) and endorsed City of Ottawa (Nov 19, 2010) with prominent Algonquin Elder Dr. William Commanda, OC.

In December 2013, Windmill held an information session on development at the Chaudiere Site; though already developed, they did not present the condo plans publicly; apparently 800 OR 900 hundred people attended (Windmill's statement); it is contended that the decade long publicity of Elder William Commanda's work and use of his name drew the crowds.

Only 200 people participated in a subsequent June 2014 consultation.

37 people submitted (mediocre) comments; even fewer submitted comments to the City (available on www.asinabka.com website, Documents page).

By contrast, over 100 people appeared in person to the City and challenged development; 78 presented substantial letters in support of the William Commanda vision (also available on www.asinabka.com website, Documents page).

In addition, literally thousands of people, including *all* the Algonquin communities, and from elsewhere across the continent, signed petitions in support of the Commanda vision, these were presented to the City in 2010.

We maintain that the developers present an erroneous, misleading and grossly misrepresentative statement regarding consultation in this high profile case.

4. Land Ownership: National Capital Commission (NCC), Windmill and Domtar agreement; and NCC and the Chaudière Hydro Limited Partnership negotiations regarding the Sacred Chaudiere Falls

Private land ownership claims remain contested; objections are strongly raised against conversion of PWGSC crown land "leases in perpetuity" to fee simple lands and private ownership; the SECRET memorandum of understanding (July 7, 2014 between the National Capital Commission (NCC), Windmill and Domtar, accessed via Privacy Legislation, (and of relevance to all Algonquins of the Ottawa River Watershed, all First Peoples and all Canadians), to sell off prime crown land in this singular historical place within the heart of the National Capital Region, including without proper consultation, is strongly contested; this action is further exacerbated by the NCC written admission of conflict of interest concerns with respect to its consultant and the Developer's support team (3 July, 2015).

Even the City's decision to rezone to permit privatization (condo development) is indicative of the fact that the claimed "private ownership" (originally of EB Eddy in the context of the development of the new country, Canada) is open to legal challenge.

Further, we note a related matter: a 22 April 2015 NCC Submission (referencing Consultations with the Algonquin Nations, September 2014) to advance development at the Sacred Chaudiere Falls, a matter by that time under public protest via a number of avenues, including in the OMB appeal which contextualized the Commanda plan for Wild Space in the Capital and an Undammed Chaudiere Falls, as already endorsed formerly by the City, in November 2010. (*To obtain approval of the NCC Board of Directors to delegate authority to the CEO to sign a Memorandum of Understanding (MOU) between the Chaudière Hydro Limited Partnership (CHLP) and the NCC. On December 8, 2006, the NCC granted Federal Land Use Approval for a New Hydroelectric Facility on Chaudière Island Site Adjacent to the Ottawa River pursuant to section 12 of the National Capital Act to Domtar Inc. The Ottawa No.1 and 2 GSs, associated lands and facilities were purchased by Hydro Ottawa in 2012. Since then, CHLP, which is fully owned by Energy Ottawa has continued to operate the GSs and now intends to proceed with the redevelopment project*. In this regard note that Elder Commanda and countless other Indigenous and non-indigenous peoples strenuously challenged the Domtar plan to expand hydro development at the Chaudiere (see www.asinabka.com for details). Further, I note several things of concern in the document referenced: the questionable consultation with Algonquins of the Ottawa River Watershed, with NCC itself having to admit Conflict of Interest, in the collusion with the Developer's team; the inclusion of the Developer's condo designs in this submission; and I NOTE further, with statistics of 2011, the 20,000 HOMES CITED REPRESENT A MERE 4 PERCENT of the homes in Ottawa. – Surely this is a negligible benefit with respect to the destruction of a unique, spectacular acknowledged Sacred Site, in unceded, unsurrendered unconquered Algonquin Territory.

5. Brownfields

Our August 17, 2015 submission to the OMB notes the following: " The developer has also introduced Business Tax Exemption incentives formally into these proceedings. This later raises a series of new concerns: We question the misrepresentation, lack of integrity and downright abuse of taxpayer money regarding environmental cleanup. The developers suggest publicly that they are investing $125,000 to clean up the Chaudiere area and are celebrated at brownfield gurus; a Citizen article of April 2015 points out that the federal, provincial and municipal governments are providing $65,000 each for Ottawa River cleanup; strangely enough, the City of Ottawa even states that it is critically important to dismiss our appeals immediately to offset potential loss of Windmill access to the public purse because of upcoming changes to funding regulations. Further, the actual owners of the site, Domtar, who are responsible for the contamination, and have inserted themselves into this OMB appeal, and who, according to google, are being challenged on environmental abuses elsewhere, are not held responsible for their actions".

6. We are Living in Times of Change

Supporters of William Commanda call upon federal leadership to address the multiple disingenuous issues embedded in practices at the Sacred Chaudiere Site.

CIRCLE OF ALL NATIONS/ASINABKA RECORDS