

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
SAVETHEBALAFALLS.COM	)	
	)	Patricia L. McLean, for the Applicant
Applicant	)	
	)	
<b>– and –</b>	)	
	)	
THE CORPORATION OF THE	)	Harold G. Elston, for the Respondent, The
TOWNSHIP OF MUSKOKA LAKES and	)	Corporation of the Township of Muskoka
SWIFT RIVER ENERGY LIMITED	)	Lakes
	)	
Respondents		Shane C. D’Souza, Jessica L. Laham, for the
		Respondent, Swift River Energy Limited
	)	
	)	
	)	<b>HEARD:</b> December 14, 2015

**WOOD J.:**

- [1] Savethebalafalls.com (STBF) seeks an injunction preventing the Township of Muskoka Lakes (TML) from leasing three parcels of land to Swift River Energy Limited (SREL) on two broad grounds. The first is that the leasing of one of the parcels by TML to SREL does not comply with section 34(1) of the *Municipal Act* and TML’s own policy numbers C-LS-01 and C-LS-08. The second is that the lease constitutes a bonus to SREL and as such is prohibited under section 106 of that Act. I find that the application should be denied for the following reasons.

**Findings of Fact**

**The Parties and the Project**

- [2] STBF is a non-share capital corporation. Its primary object as set out in its articles of incorporation is “the establishment and operation of a conservation association for the primary purpose of uniting all persons interested in the conservation of the waterfalls in Bala and maintaining the natural beauty of the island between them”. TML is the municipality within which the community of Bala is located, and the owner of the three parcels of land in question. SREL is a privately owned company. It was incorporated

specifically for the purpose of developing what it terms "small, low impact, run of the river, hydroelectric generating facilities".

- [3] In 2005 SREL was selected by the Ministry of Natural Resources (MNR) to develop a hydroelectric generating facility at Bala Falls. This was to be located on the north side of Burgess Island a piece of land that divides the falls into two cataracts. Burgess Island is the island referred to in the articles of incorporation of STBF. After ten years spent obtaining the requisite approvals SREL is ready to apply for a building permit and wishes to commence construction.

### **Bala Falls**

- [4] Bala Falls is the outlet of Lake Muskoka whose waters empty over a granite shelf into the Moon River in two streams split by Burgess Island. Each branch is controlled by a dam with floodgates.
- [5] The Falls have been both a tourist attraction and a source of power for more than 100 years. The village of Bala surrounds the site. Burgess Island is crossed by a highway, a secondary road and a railway line. It has commercial establishments located on it, and ironically was the site of a hydroelectric generating station owned and operated initially by the Bala Electric Light and Power Company Ltd, and from 1929 to 1964, by the Hydro Electric Power Commission of Ontario (HEPC). It is the property on which that generating station was located, which forms the primary subject of this application. The parcel is presently known as Portage Landing and will be referred to by that name throughout these reasons.

### **The Lease**

- [6] SREL and TML have engaged in lengthy negotiations for the lease of three parcels of land by TML to SREL during the construction phase of the project. Two of the three parcels are portions of parking lots owned or controlled by the TML They would be used as staging areas during construction for the storage of materials and the location of temporary offices.
- [7] The third parcel is Portage Landing the north-western corner of Burgess Island directly adjacent to the site of the proposed generating station. It consists of an area of trees and vegetation ending in a rocky shoreline projecting out into the Moon River. It would be extensively altered during the term of the lease by the removal of the vegetation for the construction of a road and the installation of a fixed construction crane. The draft lease provides that at the end of construction Portage Landing would be restored and improved by the addition of paths, a viewing area for the generating station, and an improved landing site for canoes.
- [8] The proposed lease document has not been entered into evidence. However the chief administrative officer of TML has filed an affidavit setting out its principal terms. These include the following provisions:

- a) A fixed term of 36 months at a rental of \$125,000 payable in advance and not refundable even if the lands are not needed for the full period
- b) Extensions at a rental of \$5200.00 per month should the work extend beyond the original term.
- c) Commencement upon the issuing of a building permit by TML and termination upon the commercial operation date of the project or twenty years from commencement whichever first occurs.
- d) Restrictions on the use to be made of the parking lot sites, prohibition of the use of one of them in Tourist season, and penalties for the use of the other in specified high traffic times
- e) An undertaking not to use Margaret Burgess park for construction purposes or to alter it in any way, notwithstanding the fact that SREL has permission from the MNR to do so.
- f) Restoration of all sites and enhancement of Portage Landing as outlined in paragraph 7.
- g) A contribution towards TML's costs for legal services and retaining a heritage consultant.

[9] The terms were negotiated by a special committee formed for that purpose whose report was filed in the material. The report reveals that considerable time was spent over the negotiations and that the terms were considered in the context of the project as a whole taking into account both the benefits and inconveniences to the Bala area which would flow from the lease.

[10] One of the most important values of the lease to the Bala area is that the use of the specified spaces by SREL will mean that the company does not have to use Margaret Burgess Park for staging. The park, located directly across from the site of the proposed generating station, is owned by the MNR which has agreed to make it available if needed. However the TML does not want to lose the use of the facility even temporarily as it is a well-loved park, heavily utilised by both Bala residents and tourists in the summer months.

#### **The issues.**

[11] STBF sets out four reasons why the court should prevent TML from entering into the proposed lease with SREL. The first is that to do so would violate the Township's own policies governing the stopping up and transferring of road allowances (C-LS-08). The second is that the lease violates policy C-LS-01 which deals with the sale of land

generally. The third is that the transfer of Portage Landing to SREL under the lease constitutes a closing of a highway and as such must be done by by-law, something TML has not done. In support of this argument STBF cites section 34 of the *Municipal Act*. The fourth reason is that the terms of the lease amount to a bonus in favour of SREL within the meaning of section 106 of the *Municipal Act*.

[12] Two of STBF's first three arguments depend upon the status of Portage Landing. Township policy C-LS-08 and section 34 of the *Municipal Act* apply only to "road allowances" and "highways" respectively. It is therefore appropriate before examining those arguments to determine whether or not either status applies to the land in question.

### **The Status of Portage Landing**

- [13] As noted earlier, Burgess Island which links the north and south sides of Bala has been developed for many years. A plan produced in 1929 by HEPC and titled 'Bala Falls Water Power Site' shows the Canadian Pacific Railway (CPR) right of way, the original road crossing the island, a church, a boathouse, and a power generating station. The generating station is located on the parcel of land now called Portage Landing. It is shown on that plan as a separate parcel of land distinct from the road right of way.
- [14] On July 15, 1964 HEPC transferred Portage Landing to the province of Ontario as "represented by the Minister of Highways". This transfer occurred in connection with a project to divert the roadway across the island (now part of Highway 69) to a new location west of the old road. Once again, the plan shows Portage Landing as a separate parcel distinct from the land over which the new road would travel.
- [15] This separate status was confirmed in the final designation plan for the improved portion of Highway 69 Registered in 1971. It too showed Portage Landing as a separate parcel and not part of the lands designated for road use.
- [16] Notwithstanding its clear history as a piece of land with nothing whatsoever to do with roads, Portage Landing became a "highway" in 2000. This anomalous state of affairs came about because the province's order in council 206/2000 included it in its transfer of Highway 69 to the District of Muskoka as part of a province wide road rationalism program.
- [17] Under section 26 of the *Municipal Act*, the definition of "Highway includes "all highways transferred to a municipality under the *Public Transportation and Highway Improvement Act*. Therefore the Province transformed Portage landing's status into that of a Highway by transferring it as part of a highway rather than by way of separate transfer.
- [18] Notwithstanding its new status, the separate and distinct character of Portage Landing was confirmed when it was transferred from DMM to TML. This transfer occurred in 2011 when DMM passed a by-law removing Portage Landing from the district road system and transferring it to the township. However notwithstanding its new ownership, Portage Landing's designation as a "highway" continued by operation of section 26 of the *Municipal Act* which provides that a highway remains a highway unless it has been closed.

### **Is Portage Landing a Road Allowance?**

- [19] However inappropriate its designation as a highway, all parties agree that Portage Landing remains one within the meaning of the *Municipal Act*. The question then becomes is it also a road allowance? STBF argues that it is.
- [20] The basis for STBF's argument that Portage Landing is a road allowance is its inclusion on two occasions as part of lands transferred for road purposes, first in 1964 and again in 2000. Reduced to its essence the argument is as follows. Because Portage landing was included in the transfers conveying the lands on which the highway was built, it must be part of that highway's road allowance.
- [21] This argument is flawed on two grounds. The first is that it ignores the fact that the parcel has always been delineated as distinct from the Highway 69 right of way. As the review in paragraphs 11-16 makes clear, Portage Landing was never a road or used as such. It appears that it simply got included when part of Burgess Island was needed for the new diversion, because HEPC no longer had any use for it.
- [22] The second flaw in the argument is that it plays fast and loose with the term "road allowance". TML has filed a thoughtful and scholarly affidavit sworn by its counsel James McIntosh. It reviews the history and usage of the phrase in both legislation and conveyancing practice. His conclusions are supported by the evidence in a second affidavit sworn by John Hiley a senior local surveyor.
- [23] Reduced to its essence the evidence of Mr McIntosh and Mr. Hiley is as follows. The phrase "road allowance" has never meant the land upon which a road or highway is constructed. Rather it is a term of art referring to the reservation for road access purposes of strips of land usually in a grid pattern, in the original Crown Surveys of Ontario. In some areas (although not Bala) these surveys also included 66' shoreline road allowances around the shores of lakes and rivers (original shoreline road allowances). The phrase "road allowance" is synonymous with and to be preferred to, the phrase "original road allowance".
- [24] Russell on Roads (3<sup>rd</sup>) edition, a well respected text on the subject, cites the 1881 court of appeal decision in *Morton v St. Thomas (City)* (1881), 6 O.A.R. 323 as authority for the restricted definition. In that decision Patterson J.A. held that the phrase was applicable only to original surveys of townships as a whole and had no reference to subdivisions or small lots. It goes on to state that this view has been expressed consistently by the courts since that time. I accept the historic evidence cited in the McIntosh and Hiley affidavits and agree with the assertion in the text set out above.
- [25] It follows therefore that a highway may be constructed in whole or in part upon a road allowance. But where it deviates from that road allowance its construction, or the conveyance of land for its construction, do not make that land a road allowance. No part of Portage landing was reserved as a road allowance in the original Crown Survey of Burgess Island therefore Portage landing is not a road allowance.

**Does the proposed lease violate Township policy C-LS-08 or C-LS-01?**

- [26] The stated purpose of township policy C-LS-08 is “To provide a procedure for the sale of original road allowances and original road allowances” As its title suggests, the policy sets out guidelines for the sale of those lands originally reserved in the Crown surveys and not required for public purposes. Since no part of Portage Landing is a road allowance township policy C-LS-08 does not apply to any action TML might take with respect to it.
- [27] The stated purpose of township policy C-LS-01 is to provide a procedure for governing the sale and other disposition of land in the ownership of the Township of Muskoka Lakes”. The three operative paragraphs of the policy provide that before any sale of township land, the council shall pass a resolution declaring the land to be surplus, obtain at least one appraisal, and provide notice of the sale to the public.
- [28] Every operative paragraph of the policy refers to a “sale” of land and sale is defined as including a lease of over 21 years. It is clear from the wording of the document that it is intended to provide a guideline for the permanent disposition of township land.
- [29] The township has no intention of permanently disposing of any of the parcels of land included in the proposed lease. Two are parking lots over which the township retains some control and even possession at certain times of the year. The third Portage landing, is to be upgraded by SREL at the end of the lease and turned back to the TML as a park. The lease is for a period of three years. Even if all the contingency extensions proposed are used, its total length cannot exceed twenty years. I find that the proposed lease terms do not constitute either a sale or permanent disposition of any township lands.
- [30] Therefore township policy C-LS-01 does not apply to the proposed lease.

**Does the proposed lease violate section 34 of the *Municipal Act*?**

- [31] STBF argues that TML cannot enter into the proposed lease until it has passed a by-law authorizing the sale. In support of this argument it cites section 34 of the *Municipal Act*. That section provides as follows.

A by-law permanently closing a highway does not take effect until a certified copy of the by-law is registered in the proper land registry office.

Although the section refers only obliquely to a bylaw, STBF argues that its wording demonstrates that the closure of a highway requires the passing of one. What is clear from the wording however, is that it refers to a “permanent” closure.

- [32] Therefore like the last argument discussed, this one depends upon an interpretation of the lease as a permanent change in the status or ownership of Portage Landing. As indicated

in paragraph 29 above, I do not accept the proposition that the lease in any way represents a permanent change in ownership or status. Rather it is a temporary grant of use for a fixed period during the construction of the hydroelectric generating station.

- [33] I find that like township policy C-LS-01 section 34 of the *Municipal Act* applies only to permanent closures and sales of highways. Since I have found that the lease does not permanently close or sell any highway, section 34 has no application to it.
- [34] Rather than permanently closing Portage Landing under section 34 of the *Municipal Act*, TML has chosen to remove or restrict the public's common right of passage and access to it for the duration of the lease. Section 35 of the *Act* grants municipalities specific power to do this by by-law. It provides as follows

Without limiting sections 9, 10 and 11, a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway. 2006, c. 32, Sched. A, s. 18.

- [35] TML passed by-law 2003-05 "to remove and restrict the public right of passage over certain untraveled portions of highway which are the subject of leases and licences", 12 years ago before this project began. That by-law provided it with the authority under section 35 to take exactly the type of action it proposes to do through the lease. I find that TML's method of proceeding with the temporary restriction of the public's access to Portage landing has been entirely appropriate.

**Would the Lease constitute a bonus or advantage to SREL?**

- [36] STBF asserts that the terms of the proposed lease would provide a bonus or advantage to SREL in violation of section 106 of the *Municipal Act*. Sections 106 and 107 provide as follows

106. (1) Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose. 2001, c. 25, s. 106 (1).

(2) Without limiting subsection (1), the municipality shall not grant assistance by, (c) leasing or selling any property of the municipality at below fair market value;

107. (1) Despite any provision of this or any other Act relating to the giving of grants or aid by a municipality, subject to section 106, a municipality may make grants, on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, including a fund, within or outside the boundaries of the municipality for any purpose that council considers to be in the interests of the municipality. 2001, c. 25, s. 107 (1).

(2) The power to make a grant includes the power,

- (b) to sell or lease land for nominal consideration or to make a grant of land;
- (c) to provide for the use by any person of land owned or occupied by the municipality upon such terms as may be fixed by council;

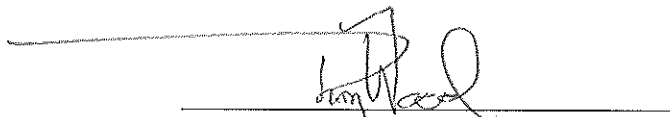
- [37] Read together these sections clearly indicate that a municipality may lease land as it proposes to do here. It may even do so for a nominal consideration providing that to do so is in the interests of the municipality and that doing so does not confer a bonus upon the commercial enterprise.
- [38] The courts have resolved these apparently conflicting provisions by looking at each transaction as a whole to determine whether or not on balance the deal is good for the municipality or, as one court put it, the commercial enterprise is 'getting something for nothing' *Nelson Citizen's Coalition v Nelson (City)* (1997) B.C.J. No. 138. In some cases such as where a lease is for a nominal amount, the transaction and the way it was negotiated, must be carefully scrutinized to ensure that taken as a whole it is in the interests of the municipality. See *Friends of Lansdowne Inc v Ottawa (City)* [2011] O.J. No. 3500, 2011 ONSC 4402 However that is not the case here.
- [39] As set out in the findings at paragraphs 6-10, the lease was carefully negotiated. The report of the committee shows that it took into account the interests of the municipality and the public in setting the proposed terms. TML receives substantial remuneration in the form of a non-refundable payment of \$125,000.00 plus \$5200.00 for every month the contract is extended past the original three-year term.
- [40] TML also gets substantial improvements to Portage Landing creating a park where none existed before. Perhaps most importantly however, the lease preserves a beloved park, which could not have been saved in any other way. TML does not own Margaret Burgess Park yet the committee clearly identified its preservation as high on the communities' list of priorities The MNR which does own it had given SREL permission to use it as a staging area if no alternate sight could be found. Providing an alternative by way of lease was therefore clearly in the interest of the community.
- [41] Although there is some advantage to SREL in having use of the three sites and in particular Portage Landing, I find that on balance the arrangement set out in the proposed lease is in the interest of the municipality and its citizens, and does not constitute a bonus to the company.

## Conclusion

- [42] In conclusion I find that the Township of Muskoka Lakes has the authority to enter into the proposed lease, that it has exercised that authority in an appropriate manner, and that on balance to do so would be in the interest of the municipality. The application is therefore dismissed.
- [43] The parties shall either submit written submissions on costs within thirty days of the date of release of this judgment or at the option of any party, shall arrange a date through the



trial co-coordinator to argue the issue.

A handwritten signature in black ink, appearing to read "T.M. Wood", is written over a horizontal line.

Justice T.M. Wood

**Released:** December 24, 2015