SUPREME COURT OF NOVA SCOTIA

Citation: *Westfor Management v. Extinction Rebellion*, 2021 NSSC 93

Date: 20210311
Docket: Halifax, No. 502324
Registry: Halifax

Between:

Westfor Management Inc.

Plaintiff

v.

Extinction Rebellion Nova Scotia Association,
Jane Doe and John Doe

Defendants

INJUNCTION DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	January 26, 2021, in Halifax, Nova Scotia
Written Decision:	March 11, 2021
Counsel:	Ian Dunbar and Robert Mroz, Counsel for the Plaintiff James Gunvaldsen Klassen and Sarah McDonald, for the Defendants

By the Court:

[1] The Plaintiff, Westfor Management Inc. ("Westfor"), is a Nova Scotia corporation which carries on the business of forest management in Nova Scotia. It is somewhat of a clearing house for several sawmills throughout the province. It advances applications to harvest timber on Crown lands to the Department of Lands and Forestry. It then allocates the right to harvest to its members.

[2] The Defendant, Extinction Rebellion Nova Scotia ("Extinction Rebellion"), is a non-profit organization dedicated to the preservation of habitat and threatened species therein. It is a non-hierarchical organization without a conventional governance model. Its purpose is to advocate for the environment and species at risk. In this case, the species is the endangered Mainland Moose.

Factual Background:

[3] In October, 2017, Westfor entered into a licensing agreement with the Province that allowed it to harvest timber in approved areas. Pursuant to that license, permits could be issued until September, 2021. In April, 2020, the Province issued various permits to Westfor. Four permits were for harvest sites near Rockypoint Lake in Digby County. Two other permits were for harvest sites near Napier Lake, also in Digby County. These permits allowed Westfor to harvest by a process called "variable retention". The Defendants consider that term as "clearcutting".

[4] The sole access route into the Rockypoint Lake site was cleared and constructed by Westfor in the summer of 2020. A similar access road was developed at the Napier Lake site. Both roadways were the only commercially-feasible access to the harvest sites.

[5] On October 5, 2020, Westfor notified the Province of its intention to harvest timber at the Rockypoint Lake site. Shortly thereafter, it became aware of Extinction Rebellion's social media campaign advocating against the harvest and its impact on the Mainland Moose's habitat. On October 21, 2020, Westfor and its contractors came across a group of protestors blocking the road to the Rockypoint Lake sites. A camp was constructed by those individuals.

[6] In light of the Rockypoint Lake blockade, Westfor redirected its timber harvesting to the Napier Lake site. On November 22, 2020, another blockade was established on the Napier Lake Road. These blockades prevented logging trucks and other harvesting equipment from accessing the harvest sites. Harvesting operations continued at the Napier Lake site but Wesfor had no way to get the product to market.

[7] On December 1, 2020, Westfor issued a Notice of Action seeking general and special damages from Extinction Rebellion. Additionally, it sought a permanent injunction against the Defendants' actions on Rockypoint Lake Road and Napier Lake Road. On December 10, 2020, this Honourable Court issued an *ex-parte* interim injunction ordering these Defendants, and the public generally, not to obstruct or block these roads. The interim injunction was served on the protesters the following day. Notwithstanding the court order, the protesters maintained both blockades. On December 15, 2020, the RCMP arrested nine individuals and the two roads were opened to woodland traffic.

[8] On January 4, 2021, Westfor filed a Notice of Motion seeking the following relief:

> 1. an interlocutory injunction pursuant to *Civil Procedure Rules* 22 and 41 and section 44 of the *Judicature Act*, R.S.N.S. 1989, c. 240, against each of the Defendants, anyone acting on the Defendants' behalf, and anyone having knowledge of the injunction, restraining and enjoining them from:
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> > i) Directly or indirectly obstructing, blockading, impairing or interfering with the Plaintiff and/or its contractors and/or their subcontractors' access to and/or use of the following properties:
> >
> > > a) Certain woodland sites in Digby County, Nova Scotia, as shown and described in harvesting permits D1099964, D1099965, D1O099966 [*sic*] (the 'Rockypoint Lake Sites');
> > >
> > > b) Certain woodland sites in Digby County, Nova Scotia, as shown and described in timber harvesting permits D1068548 and D1068549 (the 'Napier Lake Sites');
> > >
> > > c) Any other woodland sites similarly licensed and/or authorized under a Licence Agreement entered into between the Province of Nova Scotia and the Plaintiff dated October 17, 2017, most recently renewed on September 30, 2020 (the 'Authorized Sites'); and

d) Any and all roads, trails and/or access points whatsoever to the Rockypoint Lake Sites, Napier Lake Sites and/or the Authorized Sites.

ii) Directly or indirectly encouraging, assisting, aiding, or abetting any person that would, could, or will, directly or indirectly, encourage, assist, aid or abet any person to blockade access to or use of the Rockypoint Lake Sites, Napier Lake Sites, and/or the Authorized Sites.

Westfor suggests that, as a result of the blockades, it suffered substantial economic loss. Since the arrests on December 15, 2020, it has been operating on the two sites. It requests the interim injunction be extended to the trial dates.

Licenses and Permits:

[9] The evidence, as a whole, clearly established that Wesfor was entitled to carry out harvesting operations at both sites in late 2020. The following describes the process that led to the issuance of these harvesting permits:

- In November, 2017, Westfor used the provincial forest management model and inventory to identify the Rockypoint Lake and Napier Lake sites as suitable for timber harvesting.
- Westfor initiated the permit application process for the sites by submitting operating plans as part of its ongoing submissions to the Province.
- The operating plans underwent a preliminary planning review which was conducted by a regional biologist, forester and surveyors of the Province's Western Regional Service Branch.
- On December 18, 2018, the preliminary review was completed and it concluded that Westfor's operating plans could proceed to the next stages of the permit approval process.
- Subsequently, the operating plans were submitted to the Western Region Crown Land Stakeholder Interaction Committee and the Mi'kmaq Rights Initiative for further consideration and consultation.
- The Western Stakeholder Committee is convened by the Province and it included the following:

(i) Mersey Tobeatic Research Institute

(ii) Paddlers of Nova Scotia
(iii) All-Terrain Vehicle Association
(iv) Medway Community Forests
(v) Municipality of Annapolis
(vi) Nova Scotia Native Council
(vii) Queens County Fish and Game
(viii) Registered Professional Foresters Association

These processes are outlined in the affidavit of Marcus Zwicker, Westfor's General Manager. Extinction Rebellion has not advanced evidence that refutes these statements or suggests these processes were deficient. There is no evidence that these preliminary consultations yielded any objections.

[10] Westfor then carried out a pre-treatment assessment for these sites, which catalogued tree species, watercourses and wildlife. The data gathered generated detailed harvest block reports for both locations. Westfor reviewed these reports to ensure compliance with special management practices developed by the Province for the Mainland Moose.

[11] In August, 2019, Westfor submitted the Harvest Block Reports to the Province for review by the Integrated Resource Management Group. This review was conducted by the following individuals:

(a) Forester;
(b) Biologist;
(c) Official responsible for parks and protected areas;
(d) Geologist;
(e) Land administrator;
(f) Surveyor; and
(g) Official representing other miscellaneous interests, including:
    (i) Maintaining a biodiversity-rich landscape;
    (ii) Protecting restricted and limited-use land;
    (iii) Preserving cultural heritage;
    (iv) Responsible forest management;

(v) Maintaining the sustainability of forest ecosystems;

(vi) Preserving water supply; and

(vii) Preserving underrepresented ecosystems.

This review was completed on August 8, 2019 and the Harvest Block Reports were approved by the Province, allowing Westfor to proceed to the next stage of the permit approval process.

[12] When the review process was complete, the Harvest Block Reports were posted on the Province's interactive, web-based Harvest Plan Map Viewer for public viewing and comment. The evidence suggests that no public comments were received. These reports were submitted to the Minister of Natural Resources for discretionary review and ultimate approval. On March 24, 2020, the Minister approved the permits. Westfor started harvesting timber on these sites in October, 2020. Westfor submits this harvesting was compliant with its license and permits and respected the special management practice for the Mainland Moose.

[13] The evidence respecting these processes is found, once again, in the affidavit of Marcus Zwicker. Extinction Rebellion has not provided any evidence that these statements are inaccurate or that the stipulated process was deficient. It is of note that neither Extinction Rebellion nor anyone else sought judicial review of the Minister's approval. Consequently, Westfor was fully entitled to commence harvesting operations at the approved sites.

Extinction Rebellion's Position:

[14] The position advanced by Extinction Rebellion is concisely stated at paragraph 3 of its hearing brief:

> The blockades at Rockypoint Lake Road and Napier Lake Road in Southwest Nova Scotia were set up as a last resort, when all other means of protecting the few remaining critically endangered Mainland Moose had not worked. The Rockypoint Lake and Napier Lake forest harvesting sites are situated in an area known to be home to one of the last remaining relatively dense populations of Mainland Moose. This population of moose, as well as all other moose populations in mainland Nova Scotia, is in steep decline. One of the primary threats to its survival and recovery is clearcutting. The protection of this critically endangered species is a matter of clear and critical public interest.

And further at paragraph 5:

> Mainland Moose are protected under the provincial *Endangered Species Act* ('ESA'). This Honourable Court has found that the Minister and DLF failed for years to fulfill fundamental and clear statutory obligations under the *ESA* and, in May 2020, the Court issued an order of mandamus requiring the identification of Mainland Moose core habitat. To date, the requirements of the Court's order have not been fulfilled, leaving this critically endangered population without any real steps taken toward meaningful protection. In these circumstances, unless individual citizens step forward and put themselves at risk, the Mainland Moose face extirpation in this Province.

Clearly, Extinction Rebellion's actions and blockades amount to civil disobedience and self-help to advocate for the Mainland Moose. It takes no issue with any economic activities of Westfor or its contractors at the approved sites. The focus of its efforts is the Province and its inaction in preserving habitat. Essentially, Extinction Rebellion is using the Mainland Moose issue to defend against the proposed interlocutory injunction.

Interlocutory Injunctions:

[15] Nova Scotia's *Judicature Act* provides the Court with discretion to grant an injunction where it is "just and convenient that such order should be made." The test for such interim relief was established in *RJR MacDonald Inc. v. Canada* [1994] 1 SCR 311, at paragraph 43:

> [43] First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits [the balance of convenience].

An interlocutory injunction is an extraordinary remedy and, as such, must be firmly anchored on strong facts and sound precedents.

Serious Question to be Tried:

[16] The Supreme Court, in *RJR MacDonald v. Canada, supra,* stated that the threshold for whether there is a serious question to be tried is a low one. There are no specific requirements which must be met in order to satisfy this aspect of the test. A prolonged examination of the merits is neither necessary nor desirable. A Court must only undertake a preliminary assessment of the merits of the case and conclude it is neither vexatious nor frivolous. Extinction Rebellion concedes that

Westfor's underlying claim meets the threshold on this first aspect of test. I agree with that concession.

Irreparable Harm:

[17] Westfor takes the position that Extinction Rebellion's "tortious and illegal conduct" amounts to *prima facie* proof of irreparable harm. It further argues that Extinction Rebellion's evidence and submissions in defence of this application is nothing more than a collateral attack on the Minister's decision to grant Westfor its harvesting permits.

[18] In *RJR MacDonald v. Canada, supra,* the Court discussed the term "irreparable harm" at paragraphs 62-64:

> 62. Beetz J. determined in *Metropolitan Stores*, at p. 128, that '[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm'. The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at this stage.
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> 63. At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
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> 64. 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), reputation *(American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The evidence of irreparable harm advanced by Westfor relates primarily to the economic loss it will suffer as a result of future blockades. It further argues that Extinction Rebellion will have no ability to respond to those losses with costs. Westfor identifies the following consequences of blockades:

- It spent $240,000 to apply for harvesting permits and that expense cannot be recovered without ongoing harvesting at the two sites.
- It spent $348,000 constructing roads to those sites and that will be lost if it cannot continue harvesting.
- Contractual relations with third-party contractors will be interfered with, causing additional losses to Westfor.
- There are no available sites approved for transfer of their operations.
- Blockades will hinder trucking, leaving Westfor shareholders without product and causing financial loss to both.

There is no evidence challenging the veracity of these submissions. I accept that future blockades will create these impacts.

[19] Economic loss can equate to irreparable harm. In *West Fraser Mills v. Members of Lax Kw'Alaams,* 2004 BCSC 815, the Court granted an injunction, stating that the Defendants' interference with the Plaintiff's business was, in itself, evidence of irreparable harm. The Court stated at paragraph 21:

> West Fraser Mills cannot log the area, even though it has a right to do so, while the blockade is maintained. The blockade is a serious and immediate interference with West Fraser Mills' business. Interference with the business as an ongoing concern amounts to irreparable harm. *International Forest Products Ltd. v. Kern,* 2000 BCSC 1141 (CanLII), [2000] B.C.J. No. 1533 (S.C.) at para. 33.

Extinction Rebellion argues that the non-violent aspect of the blockades displaces this inference. I respectfully disagree. In *Hudson Bay Mining & Smelting Co. Limited v. Dumas et al.*, 2014 MBCA 6, the Court held it was reasonable for the motion judge to have drawn an inference of irreparable harm based on the Defendants' blockade of lawful business activities, despite the protests being peaceful. On the basis of the evidence before me, that inference is available if required.

[20] It is undisputed that Extinction Rebellion will not be in a position to pay damages should Westfor succeed on the action. It is a non-profit society without assets and is dependent on the public for financial support. All members are volunteers who consider themselves as members of a movement. Westfor argues that Extinction Rebellion's inability to satisfy a judgment weighs strongly in favor of finding irreparable harm.

[21] In *Husby Forest Products Ltd. v. Jane Doe*, 2018 BCSC 676, the Court held that the Defendant's inability to satisfy a judgment weighs strongly in favor of finding irreparable harm. The Court stated at paragraphs 43 and 45-48:

> **43** Irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured, usually because a party cannot collect damages from the other: *RJR-MacDonald Inc*. at 341. To meet this stage of the test what is required is doubt as to the adequacy of damages.
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> …
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> **45** The extent of the harm caused to Husby by the defendants' actions has already been significant. Employees have been laid off, contractors are unable to fulfill their obligations, almost one quarter of Husby's annual allowable timber cut, 47,600 cubic metres, is susceptible to degradation and rot as a result of the blockade, silviculture opportunities are being lost, and Husby is incurring fixed costs of approximately $8,500 per day. These damages are largely monetary so the question is whether there is any reasonable prospect of Husby being able to recover from the defendants.
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> **46** The defendants are relatively small in number and have apparently been fundraising online, with limited success, to support their endeavour. There is no evidence to suggest that the defendants individually or collectively are financially able to pay damages of this magnitude nor is there any evidence to suggest that they are part of an organization or entity that has assets at its disposal that can be used to pay damages to Husby. Specifically, the evidence is clear that the defendants are not acting on the direction, or under the auspices, of the CHN so Husby is not able to look to CHN for recovery of its damages. Damages that cannot be recovered are a relevant consideration for the purposes of assessing irreparable harm.
>
> **47** The plaintiffs have accordingly established that they have suffered and are continuing to suffer irreparable harm which is unlikely to be compensated by the recovery of damages from the defendants.
>
> **48** Husby holds all of the necessary permits, approvals, and authorizations to conduct its logging operation at Collison Point. Accordingly, the defendants have no legal right to obstruct Husby's operations.

Civil Procedure Rule 77.04 was available to Extinction Rebellion. It states:

> 77.04(1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

It did not avail itself of this relief.

Balance of Convenience:

[22] In *RJR MacDonald v. Canada*, *supra,* the Court discussed this aspect of the test at paragraph 67:

> 67 The third test to be applied in an application for interlocutory relief was described by Beetz, J. in *Metropolitan Stores* at p. 129 as: 'a determination of which the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits'. In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the balance of convenience are numerous and will vary with each case. The weight given to each factor will vary from case to case.

[23] In *Sipekne'katik Band Council v. Doe*, 2020 NSSC 310, Justice Chipman confirmed there is a presumption that the balance of convenience favors the party seeking to enjoin illegal acts. The actions of Extinction Rebellions and its protesters are illegal acts even though they consider them "justified".

[24] The consequences to Westfor of past blockades, and of future blockades, is well-established in the evidence and reviewed in this decision. Extinction Rebellion will suffer little harm if the injunction is granted. It will not experience economic loss and it will not be deprived from continuing its campaign in support of the Mainland Moose.

[25] *Slocan Forest Products v. Valhalla Wilderness Society,* [1998] B.C.J. No. 1255, is very similar to the case at bar. The balance of convenience was between a Plaintiff with the legal right to construct, use and maintain a public road and a group of persons who resorted to an illegal blockade to impede that right for a secondary purpose. The Court stated at paragraph 23:

> The virtue of this cause and the objective correctness of their values and their assessment of potential harm from the road construction and logging are all completely irrelevant because the rule of law in our democracy requires that rights are established and adjudicated by due process, not by force. Once it was established that user rights had been granted after due process by properly authorized administrative officials, there is indeed nothing that can be placed on the balance on the side of the blockade.

I must conclude, as well, that Extinction Rebellion's Mainland Moose evidence is not relevant to the application before this Court. The rule of law must prevail.

[26] The integrity of Extinction Rebellion's actions do not play a role in the balance of convenience analysis. In *Siksika Nation v. Crowchief, supra,* Justice McDonald stated at paragraph 57:

> **57** The Respondent made passionate and able submissions respecting the balance of convenience. The Respondent feels that the members of the Siksika Nation have been lied to and cheated by the Applicant in its handling of the 2013 Flood Rebuild Plan. Despite the numerous meetings, discussions, disclosures, and consultations between the Applicant and the Respondent, the Respondent continues to feel let down and misled by the Applicant. The Respondent submits that granting this injunction would amount to an injustice and would cause the Respondents to lose hope in the system. It is obvious to me that there is a history behind this conflict that goes well beyond the scope of this Application.

The Court concluded it could not resolve the underlying conflict between the parties by denying the injunction application. It found that their disputes and concerns were of a political nature and should be addressed in that forum.

[27] Extinction Rebellion is a public-interest litigant and its submissions are rooted in public interest. However, that approach does not displace the rule of law. It was availed of the opportunity to advance a judicial review of the Minister's decisions and processes. That opportunity has been lost. It cannot be addressed in this proceeding.

Conclusion:

[28] I find that Westfor has established a strong *prima facie* case against Extinction Rebellion. I find that Westfor would suffer irreparable harm should the interlocutory injunction be denied. I find that the balance of convenience favors the issuance of the injunction. Consequently, the order shall issue on terms to be discussed later in this decision.

Quia Timet Relief:

[29] Westfor seeks *quia timet* injunctive relief which would prevent Extinction Rebellion and others from engaging in similar conduct into the future. It argues that such relief should extend to the following:

> Any other woodland sites similarly licenced and/or authorized under a Licence Agreement entered into between the Province of Nova Scotia and the Plaintiff dated October 17, 2017, most recently renewed on September 30, 2020 (the 'Authorized Sites'); and
>
> Any and all road, trails and/or access points whatsoever to the Rockypoint Lake Sites, Napier Lake Sites and/or the Authorized sites.

Quia timet is defined as an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced.

[30] Justice Sharpe discusses *quia timet* injunctions in his textbook, *Injunctions and Specific Performance.*

> 1. The jurisdiction to award *quia timet* injunctions is undoubted. It is said to be an illustration of the rule that prevention is better than cure especially where the cure in damages may be uncertain and the courts have extolled their preventive function.
>
> > No part of the jurisdiction of the old Court of Chancery was considered more valuable than the exercise of jurisdiction which prevented material injury from being inflicted, and no subject was more frequently the cause of bills of injunction than the class of cases which were brought to restrain threatened injury as distinguished from injury which was already accomplished.

Justice Sharpe states that there must be a high degree of probability that the harm will in fact occur in order for a Court to grant *quia timet* relief.

[31] In *Operation Dismantle Inc. v. R.,* [1985] 1 S.C.R. 441, the Supreme Court of Canada conveyed the importance of clear evidence of probable harm in these types of applications at paragraph 36:

> It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. The unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

As in any injunction application, the harm to be enjoined must be irreparable.

[32] Westfor has not provided sufficient evidence to establish the high degree of probability that Extinction Rebellion will obstruct or otherwise interfere with future operations. It relies on the Rockypoint Lake and Napier Lake blockades to

support its position. Similarly, it relies on the prior "herbicide protests" and protests on the Halifax MacDonald Bridge. I have reviewed Extinction Rebellion's social media posts and find they advocate for general resistance but not specific action. Consequently, a *quia timet* injunction will not issue.

Costs:

[33] I am not prepared to award costs as against Extinction Rebellion. This organization, and similar public interest groups, are well-intentioned and play a role in our modern-day democracy.

Coady, J.