Court File No.: 15-0922-DC

ONTARIO
DIVSIONAL COURT

B E T W E E N :

AWARE SIMCOE: ENVIRONMENTAL AND SOCIAL SOLUTIONS INC.

Applicant

- and -

CORPORATION OF THE COUNTY OF SIMCOE and TECUMSETH ESTATES INC.

Respondents

APPLICATION UNDER the *Judicial Review Procedure Act*, RSO 1990, C J.1 and Rule 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194

COST SUBMISSIONS OF THE APPLICANT

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1. This Court has recently surmised that "A review of the cases indicates that it is not usual to order costs against an unsuccessful public interest litigant." While it is the normal rule that costs follow the event, the courts often exercise their discretion to order no costs against a well-behaved public interest litigant. In the circumstances of this case, the public interest factors warrant a departure from the practice that costs follow the cause.

   Tab 2: *DeLarue v. Kawartha Pine Ridge District School Board*, (2012) 226 A.C.W.S. (3d) 54 ["*DeLarue*"] at 4.

2. If an applicant satisfies the Court that the proceeding constituted public interest litigation, it "should not be subject to the normal two-way costs regime".

   Tab 3: *Incredible Electronics* Inc. v. Canada (Attorney General), (2006) 80 O.R. (3d) 723 ["*Incredible Electronics*"] at 83.

3. The Ontario Law Reform Commission set out five factors for an analysis of whether an entity is a "public interest litigant". This test was referred to in the leading case of *Incredible Electronics*, amongst numerous others, and is applied below.

   Tab 3: *Incredible Electronics* at 71.

The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved

4. A public interest litigant must take a position on an issue that is important to the public. The volume of local media coverage on this matter, before, during, and after the injunction hearing, is demonstrative of its public interest.

   Tab 3: *Incredible Electronics* at 91.
   Tab 4: Selection of news articles covering the subject matter.

5. This particular case went far beyond the private interests of any of the parties. Your Honour found that this was a "compelling proceeding which engaged issues of environmental concern, the social value of protest, limitations on the rights of ownership of private property, public influence over private property and who is the guardian of public interest" (the "Court's Characterization").

6. In deciding not to award costs against various parties in *Incredible Electronics*, Justice Perell found that the matter "raised important public policy questions, about the media, the dissemination of information, cultural sovereignty, and the regulation of the broadcasting and entertainment industries." Although the subject case deals with entirely different themes, the principle of the importance of adjudicating public policy questions is equally operative in this case.

Tab 3: *Incredible Electronics* at 92.

The litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding

7. The Respondents have made much of the fact that the Applicant will not be financially harmed by clearcutting of the subject woodlot. This fact now militates in favour of a finding that an adverse cost award should not be levelled against the Applicant.

8. In addition to demonstrating a lack of financial interest, virtues such as "courage, loyalty, patriotism, dedication to a worthy cause, and the pursuit of justice may qualify the litigant as a public interest litigant."

Tab 3: *Incredible Electronics* at 98.

9. The Applicant was pursuing justice in prosecuting the injunction motion. The sole argument that it was making was that justice was not seen to be done in the Corporation of the County of Simcoe's (the "County") decision to condemn the subject woodlot.

The issues have not been previously determined by a court in a proceeding against the same defendants

10. The issues have not been previously determined against the same defendants. Rather, according to counsel for the County's correspondence dated September 24, 2015, Your Honour's "comments, particularly regarding process, have been noted." This case possessed novel issues and the County has benefitted from judicial guidance.

The defendants have a clearly superior capacity to bear the costs of the proceeding

11. The *Incredible Electronics* decision indicates that disclosure of financial circumstances of the Applicant shall be made in determining whether to give it special treatment.

Tab 3: *Incredible Electronics* at 100.

12. It is common ground that the Applicant has no assets with which to satisfy a costs award. Pursuit of the Applicant's twin goals of good governance and environmental protection in Simcoe County are conducted on a shoestring budget that primarily relies upon the volunteer efforts and resourcefulness of its board of directors and members.

See Tab 5 for a brochure confirming the Applicant's Mission Statement

13. Fundraising efforts for this litigation have amassed approximately $5,205.00. After deducting disbursements from this total, counsel for the Applicant has conducted this litigation on an almost entirely *pro bono* basis.

14. There is no dispute that the Respondents, comprised of the County and Tecumseth Estates Inc. (the "Developer"), have far superior financial resources.

15. The Developer may assert that as a private party, despite its superior resources, it should not have to subsidize an unsuccessful opponent. Quinn J. was of the opinion that this concern is "trumped" if the litigation raises an issue of public importance.

Tab 6: *Lancaster v. St. Catharines (City)*, (2013) 19 M.P.L.R. (5th) 111 ["*Lancaster*"] at 169 and 170.

The litigant has not engaged in vexatious, frivolous or abusive conduct

16. It is respectfully submitted that the comment made by senior counsel for the Developer that this motion was "frivolous and perhaps vexatious" because of an alleged "total lack of evidence in support of its substantive position", deserves condemnation from the Court.

17. In *Lancaster*, the respondents were found to have attacked the character of the public interest litigant by alleging an improper motive. The court found this to be a suggestion of *mala fides*. The court found that the failure of the attack "at the very least", left the respondents open to the argument that their global success was divided. The Developer in the subject case is likewise guilty of a baseless attack on the Applicant's motivations.

Tab 6: *Lancaster* at 197 and 198.

18. As is acknowledged in the reasons at paragraph 7, the Applicant's position was solely based upon whether natural justice was denied. What the County refers to as a "thinness of the facts" was an attempt by the Applicant to bring forward a targeted and direct challenge to what it saw as the critical questions of natural justice. On this basis, costs for all parties, and the usage of judicial resources, were preserved to the extent possible.

19. In *DeLarue*, the successful respondent sought $125,281.75 on a partial indemnity basis. The Court found that the applicants were genuine public interest litigants but still ordered $25,000.00 payable to the respondent on the basis that it adopted a 'no holds barred' approach to the litigation. Further, the applicants had raised significant donations and there was no suggestion that they had not retained any money to satisfy costs. In the present case, no funds are available for costs and every possible limit in scope was placed on this proceeding to distil it down to its core question of law.

Tab 2: *DeLarue* at 2, 7, 11 and 12.

20. The County admits at paragraph 3 of its cost submissions that its process was "flawed" but it goes on to state "it was unfair and in fact inappropriate…to challenge the County…"

21. One of the County's flaws was that it breached of the *maxim* that "he who decides must hear". There is not a single case in Canadian jurisprudence where a decision-maker that breached this principle was excused, much less a finding that such a breach did not constitute a serious issue to be tried. The Applicant raises this issue not to criticize Your Honour's decision, but to submit that there was nothing "unfair" in its "challenge" to the County. The Applicant took its guidance from the totality of the legal precedents. Though it lost, there was nothing improvident in its attempt to fulfill its not-for-profit mandate.

22. In support of its position on the so-called "frivolous and perhaps vexatious" nature of these proceedings, the Developer points to the Applicant gathering evidence obtained through trespass. There is no evidence, let alone a finding, that members of the Applicant engaged in trespass or knowingly used material obtained through trespass. The Developer also complains about the term "Beeton Woods". There is simply nothing offensive or

derogatory about this identifier. It was used so that people had a consistent way of describing this woodlot in Beeton.

23. Nothing in the record suggests *mala fides* on the part of the Applicant. The directors of the Applicant would not have provided an undertaking for damages to support a claim that was frivolous. Rather, the Applicant brought on this challenge to engage with precisely the matters identified in the Court's Characterization of this case.

Quantum of costs

24. In the strict alternative, the Applicant takes issue with the cost outlines of the Respondents. Neither outline breaks out the amount of time that is attributable to each task. The total time spent by the County's counsel is 78 hours and that of the Developer's counsel is 88.5 hours. The partial indemnity rates are well in exceedance of half of counsels' full rates.

25. For comparison, Applicant's counsel has provided an outline with a total time expenditure of 67.2 hours (given that the matter was *pro bono*, hourly rates are not included). This is despite the fact that it had to deal with the submissions of both Respondents. Given the substantial involvement of senior counsel for both Respondents, a substantial efficiency saving should have been realized by them.

Tab 7: Applicant's Cost Outline.

26. A total of 50 hours at a partial indemnity rate of $200.00 is more appropriate for each of the Respondents. With taxes and disbursements, a total adverse costs award of $25,000.00, would meet the reasonable expectations of a private interest litigant.

Conclusion

27. Neither of the Respondents engaged with the actual factors in the jurisprudence that define what constitutes public interest litigation. If the Respondents intended to address the case law, they ought to have done so in their original submissions so that the Applicant had an opportunity to respond.

28. The Respondents focused on attacking the motivations of the Applicant in "challenging" the County and holding up the Developer's business with a "frivolous" claim. They do not accept the spirit with which this litigation was being pursued, despite it being laid out for them in the Court's Characterization of this matter.

29. Having established the public interest nature of this litigation, the Applicant respectfully submits that no costs should be awarded. To do otherwise would have a chilling effect on further *bona fide* efforts to bring forward targeted and direct litigation that is in the public interest. It would also put a severe strain on the ability of the Applicant to continue working towards its mandate and participating in the democratic process in Simcoe County.

30. The Applicant submits that the parties ought to bear their own costs of the motion. If this Honourable Court finds impropriety in the Applicant's conduct, which is strenuously denied, following *DeLarue*, 1/5 of $25,000.00, for a total adverse costs award of $5,000.00 would be fair and reasonable in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, this 14th day of October, 2015.

Michael Fleischmann
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Lawyers for the Applicant