

CITATION: *Oro-Medonte Property Owners' Association v. The Corporation of the Township of Oro-Medonte*, 2023 ONSC 4019
COURT FILE NO.: CV-21-969
DATE: 20230706

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ORO-MEDONTE PROPERTY OWNERS' ASSOCIATION, Plaintiff

AND:

THE CORPORATION OF THE TOWNSHIP OF ORO-MEDONTE,
Defendant/Moving Party

BEFORE: C. M. SMITH J

COUNSEL: James J. Feehely, Counsel for the Plaintiff/Responding Party

Christopher J. Williams and Brian Chung, Counsel for the Defendant/Moving Party

HEARD: In writing

ENDORSEMENT ON COSTS RE: SUMMARY JUDGMENT MOTION

PROCEDURAL BACKGROUND

[1] This matter arose as a result of a dispute between the plaintiff, being the Oro-Medonte Property Owners' Association, (the "OMPOA"), and the defendant, the Corporation of the Township of Oro-Medonte, (the "Township"), over the legality of user fee By-law 2020-074 passed by the Township which imposes fees on users of the local water system.

[2] The Township brought a summary judgment motion which was heard February 8, 2023. In my reasons for decision, cited as *Oro-Medonte Property Owners' Association v. The Corporation of the Township of Oro-Medonte*, 2023 ONSC 2713, the motion was granted.

[3] The Township now seeks its costs.

POSITIONS OF THE PARTIES

The Township

[4] The Township submits that as the successful party it is presumptively entitled to its partial indemnity costs in the amount of \$112,799.90 inclusive of taxes, fees, and disbursements.

[5] In support of its position the Township points to a number of the Rule 57 factors including, but not limited to, the results obtained, the experience of the lawyers involved and the parties' reasonable expectations.

[6] The Township also submits the overarching principle in the making of cost orders should be the notion of reasonableness. Costs orders should reflect what the court views to be a reasonable amount for the unsuccessful party to pay.

[7] The Township suggests the OMPOA took at least two improper steps in the matter. The OMPOA essentially argued the by-law in question was unreasonable, which is clearly prohibited by the provisions of the *Municipal Act*. Secondly, the OMPOA commenced an action when it should have proceeded by way of application, which is contrary to the provisions of s. 273(1) of the *Municipal Act*.

The OMPOA

[8] The OMPOA submits that its claim was brought as a matter of public interest affecting a significant number of the township's population and impacting on the township's duties to provide safe drinking water systems for its residents.

[9] The OMPOA therefore submits imposing a significant costs order on a ratepayer group that has a genuine interest in a matter of public health and safety would send a chilling message to ratepayers generally.

[10] The OMPOA therefore submits that no costs should be awarded, or in the alternative, only "very modest costs" should be awarded.

RELEVANT LEGAL PRINCIPLES

1. Caselaw

[11] The primary objective of a costs order should be the determination of a fair and reasonable amount the unsuccessful party in the particular proceeding ought to pay as distinct from an amount that is simply a reflection of the successful party's bill of costs. One governing principle should always be what the unsuccessful party could reasonably expect to pay in costs: see *Boucher v. Public Accountant's Council for the Province of Ontario*, [224] O.J. No. 2634, see *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495, and see *Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Incorporated*, 2018 ONCA 383.

[12] In *Serra v Serra*, 2009 ONCA 395, the Ontario Court of Appeal held three principles must be born in mind when making a costs order, those being, (i) to partially indemnify

successful litigants for the costs of litigation; (ii) to encourage settlement; and (iii) to discourage and sanction inappropriate behaviour.

[13] Proportionality and reasonableness are considered to be “touchstone considerations” in the determination of a suitable costs award: see *Beaver v. Hill*, 2018 ONCA 840 at para. 12.

[14] A partial indemnity costs order is typically the norm unless there has been an exchange of offers to settle which may affect the quantum of costs: see *DCR Strategies Inc. v. Gomez*, 2021 ONSC 8343.

2. Statute law

[15] Section 131 of the *Courts of Justice Act* provides the question of costs is in the discretion of the court.

Rule 57

[16] Rule 57 contains a number of factors courts should consider in determining costs issues. I find the following of those factors to be relevant in the circumstances of this case:

- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged, and the hours spent, by that lawyer;
- the costs an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the complexity of the proceeding;
- the importance of the issues, and
- whether any step in the proceeding was, (i) improper, vexatious, or unnecessary, or (ii), taken through negligence, mistake, or excessive caution.

APPLICATION OF THE RELEVANT LEGAL PRINCIPLES TO THIS CASE

1. The principle of indemnity

[17] The Township was completely successful. Its summary judgment motion was granted and the OMPOA’s action was dismissed. That being the case, the Township is presumptively entitled to its costs. As the Township is only seeking partial indemnity basis there is no need to enter into a consideration of what level of costs is warranted in these circumstances.

[18] Counsel for the Township, Mr. Williams and Mr. Chung, are both highly experienced lawyers. Mr. Williams has been practicing since 1980, now some 43 years, all of which has been spent practicing in the field of municipal law. His full indemnity rate is currently \$875/hour, his

partial indemnity rate being 60 per cent of that amount or \$525/hour. Mr. Chung has been practicing in the field of civil litigation since his call in 2014. His full indemnity rate is currently \$450, his partial indemnity rate being 60 per cent of that amount or \$345/hour.

[19] I have carefully reviewed the Township's bill of costs. It shows that between them, Mr. Williams and Mr. Chan spent approximately 250 hours on this matter. They were supported in that endeavour by one other lawyer in the firm, an articling student, and a paralegal none of whom spent any significant amount of time on the file. The Township filed something in excess of 3,300 pages on CaseLines, the bulk of which consisted of pleadings and supporting documentation. Extensive cross examinations were conducted by both parties on affidavits prepared for the purpose of setting out the history of the matter and the various steps at Township council took to deal with the issue. That required a great deal of documentation as well as a significant amount of time reviewing those documents and digesting their contents.

[20] Counsel for the Township are both highly experienced lawyers who are well versed in the complexities of municipal law generally, as well as the specific issues involved in this case. I have no reason to doubt the accuracy of their bill of costs. The time expended by both counsel is in my view commensurate with the complexities of this matter, reflective of the importance of the issues to the parties, and consistent with the time expended and fees billed by counsel for the OMPOA.

[21] I note the bill of costs of the Township was not challenged, or even commented upon, by counsel for the OMPOA in his costs submissions.

2. Reasonable expectations of the unsuccessful party

[22] Counsel for the OMPOA, Mr. Feehely, filed a bill of costs which shows he spent some 178 hours on the matter at an hourly rate of \$500 per hour. His more junior colleague spent 10 hours on the file at an hourly rate of \$300/hour. Total hours shown under each heading were all in even, round numbers. The total of fees, HST and disbursements is shown to be \$110,187.49. The partial indemnity fees, calculated to be \$64,071.00, is shown in italics however, there is nothing to suggest, and no reason for me to believe, that anything other than the total of fees, HST, and disbursements was actually billed and paid.

[23] In my view, the most accurate measure of what an unsuccessful party might reasonably expect to pay in a costs award, ie: the unsuccessful party's reasonable expectations, is that party's own costs. Here, the total fees charged to the OMPOA by counsel is within \$2,500 of the partial indemnity fees amount sought as costs by the Township.

3. Complexity

[24] This was a matter of above average complexity. It involved a consideration of history of the arrangements between the Township and a private entity that built and owns a good part of the water system involved. That meant a consideration of various memorandums of understanding agreed to by those parties over the years, a review of the Township's by-laws on the subject, a consideration of the interplay between various pieces of legislation including the *Municipal Act* the *Safe Drinking Waters Act*, the *Development Charges Act*, and the regulations of the Ministry of the Environment, Conservation & Parks who oversee drinking water systems

in Ontario. The affidavit material filed by each party was lengthy and set out each parties' perspective on the history of the matter and on the current circumstances. It was also necessary to delve into the way in which Township council approached the issue once it determined that significant improvements had to be made to the water system.

4. Importance of the issues to the parties

[25] To my mind there were two main areas of concern for the parties. The first of course involved the provision and establishment of the supply of safe drinking water. It also means provision and supply of adequate water for firefighting purposes. Both are essential components of life in modern urban and semi-rural settings. The other issue which often underlies matters of this kind is that of the costs associated with the provision of such services. There can be no question the ratepayers here were perhaps understandably concerned about the proposed fees that were being levied by the Township. Equally, the Township itself was concerned about the fees that needed to be charged and sought ways to ameliorate those fees. Nevertheless, at the end of the day, in order to have a safe and proper supply of drinking water someone must pay for the distribution system. That "someone" must inevitably be the citizens of the community in question.

5. Whether any step in the proceeding was unnecessary or taken through mistake

[26] As noted above, the plaintiffs chose to pursue their claim for relief by way of an action. The *Municipal Act* provides such matters shall be dealt with by way of application. This was brought to the attention of the OMPOA by counsel for the Township fully one year before the hearing of the summary judgment motion. The OMPOA chose to disregard that requirement. That being the case it would have been fully within my authority to dismiss the plaintiff's action at the outset of the hearing, as I was indeed urged to do by counsel for the Township. I chose not to do so due to concern at the prospect of causing last minute unfairness and substantially increased costs to the OMPOA. Nevertheless, the OMPOA should have complied with the statutory requirement. It is there for good reason, the application process being a more expeditious, streamlined and simplified proceeding. It would also be less expensive for all concerned.

WHAT IS A REASONABLE COSTS AWARD IN ALL OF THE CIRCUMSTANCES?

[27] The OMPOA argues that "imposing a significant cost order on a ratepayer group that has a genuine interest in a matter of public health and safety would send a chilling message to ratepayers generally." The OMPOA therefore submits that as the issues raised were of genuine municipal importance no costs, or at least only very modest costs, should be imposed on the OMPOA. I do not find that argument persuasive.

[28] In my Reasons for Decision, I found the ownership issue was a red herring. I found that regardless of the ownership issue, the Township was obliged to deal with the pressing issue of required improvements to the drinking water distribution system in accordance with its obligation to ensure the system met government mandated drinking water safety standards and satisfied fire control flow requirements. As I observed in my decision, it is difficult to avoid the conclusion the OMPOA's arguments in this matter had more to do with its concern about the

potential cost to each of the homeowners affected by the impugned by-law passed by the Township, and the perceived unreasonableness of that by-law, than it did with any concerns the OMPOA may have had about who rightly owned the system. That approach strikes me as a convenient way to get around the provisions of s. 272 of the *Municipal Act* precluding complaints about by-laws based on perceived unreasonableness.

[29] As counsel for the respondent observed during the hearing of the matter, “these works are necessary, and if they are necessary somebody has to pay for them.” In this case, that “somebody” is each property owner in the affected area.

[30] In choosing to pursue its claim against the Township over the impugned by-law, whether it be by action or application, the OMPOA caused the Township to incur legal fees, inclusive of HST and disbursements, in the total amount of \$188,865.01. Those fees were necessary in order for the Township to defend its by-law, and since they were necessary somebody has to pay them. Once again, that falls to the other property owners in the affected area, many of whom apparently opted to simply shoulder their share of the added expense of the improvements rather than litigating the issue. They must now also shoulder the burden of paying the costs associated with the Township’s successful defence of the OMPOA’s lawsuit.

[31] To impose a partial indemnity costs order on the OMPOA in such circumstances is not, in my view, tantamount to sending a “chilling message to ratepayers generally.” Rather, such an order addresses some of the key principles underlying costs orders generally: it addresses the principle of indemnity, encourages settlements, and fosters reasonableness. It also lessens the impact of the Township’s legal fees on those homeowners who chose not to participate in the litigation, placing it instead where it more rightly belongs, on those who did. To do otherwise would only encourage potential litigants to proceed with unnecessary and perhaps expensive litigation in the belief they could do so without risk or consequence: see *El-Hennawy v. Law Society of Upper Canada*, 2014 ONSC 1640 (Div. Ct.).

[32] Disgruntled ratepayers contemplating litigation against local government need to first take a step back and engage in an objective consideration of the big picture. Afterall, when they sue their local government, they are essentially suing themselves.

[33] I have therefore concluded that a fair and reasonable costs award in these circumstances is to require the OMPOA to pay the Township’s partial indemnity costs in the amount of \$112,799.90 forthwith.



C. Smith, J