NOTES FOR ECOJUSTICE COUNSEL

MEETING OF CORPORATE SERVICES AND ECONOMIC DEVELOPMENT COMMITTEE

February 17, 2009

- Thank you, City Council members, for allowing me to address you today
- I will take 5 minutes to comment on the report by City legal counsel to this Committee, and my main points will be:
- **1) community groups who want to engage in public interest litigation with the City are already deterred by high costs; 2) there is a big distinction between normal civil litigation between private parties and public interest litigation; 3) this distinction impacts on the incentive to settle cases; 4) City legal counsel's discretion to seek costs**

1) Community Groups Already Deterred

- Report notes that costs are rarely awarded by tribunals such as the OMB, and only where the conduct of the party has been unreasonable, frivolous, vexatious or in bad faith
- Report contrasts the practice of tribunals with the "general standard for court costs" in civil litigation matters – where partial (or even substantial) costs follow the event, thereby creating a deterrent for litigation.
- But report fails to:

    - a) acknowledge that the time and money that must be invested by non-profit community groups simply to engage in litigation (whether before a tribunal or a court) is already a deterrent….

2) Normal vs. Public Interest Litigation

b) Report also fails to distinguish between normal civil litigation between private individuals and companies with a financial self-interest in the dispute, and *public interest litigation* where at least one of the parties is a *public interest litigant*

- in other words, not all civil litigation is equal
- in 2003, in a matter where costs were awarded to a First Nations litigant before the hearing, the SCC stated in *B.C. v. Okanagan Indian Band* that "Public law cases, as a class, can be distinguished from ordinary civil disputes". So the highest court in Canada has already endorsed the policy that costs in public interest litigation require special treatment.
- Since 2006, the Ontario courts have clearly identified a "one-way" approach to costs, whereby a public interest litigant will recover costs if he or she succeeds but will not be liable to pay costs if he or she fails.
- The two key cases from Ontario are *Incredible Electronics v. Canada* (Superior Court) and *St. James Preservation Society v. City of Toronto* (Court of Appeal)
- *Incredible Electronics* looked back to a 1974 Task Force which stated: "We are embolded to suggest at this point that it is no longer self evident that cost should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against the losing party operates unequally as a deterrent … [especially] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual or private interests at stake.
- *Incredible Electronics* then looked to a 1989 Ontario Law Reform Commission, which noted that "cost rules posed a formidable deterrent to public interest litigation": "The Commission recommended that a one-way rule should be applied when it was established that: (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; (b) the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically; (c) the issues have not been previously

determined by a Court in a proceeding against the same defendant; (d) the defendant has a clearly superior capacity to bear the costs of the proceeding; and (e) the litigant has not engaged in vexatious, frivolous or abusive conduct.

- As this Committee can see, the issue of costs awards against community groups (or public interest litigants) has been considered for many years, and *Incredible Electronics* (supported subsequently by the Court of Appeal in *St. James Preservation Society*) provided guidance in terms of defining a public interest litigant and public interest litigation worthy of special costs treatment
- Unfortunately, the report to this committee from City lawyers provided an incomplete assessment of the criteria provided in *Incredible Electronics*, and subsequently focused on a Divisional Court decision that is being challenged before the Court of Appeal by my clients
- The relevant criteria in terms of establishing a public interest litigant include:
    - If the community group is not vindicating a purely private interest, or if they are taking a side on an issue the resolution of which is important to the public
    - If the community group is purely a busybody or interloper
    - If the community group is best situated to litigate the issue
    - If the community group displays courage and dedication to a worthy cause and the ends of justice
    - If the community group is representing a disadvantaged group (distinguish with *Canadians for Language Fairness*)
- Such criteria may be useful for the committee to consider in determining this resolution.

3) No incentive to settle

To return to the City lawyer's report, I think it has to be said that cost awards in the public interest litigation context are

not, and should not be "a routine part of the legal process, as well as a tool to encourage parties to settle disputes"

- Both the City and the courts should avoid policies on costs that link the economic incentive to settle with public interest litigation – the threat of a larger costs award against impecunious community groups will only serve to deter them from engaging in important public debates before Tribunals and courts

4) City legal counsel's discretion to seek costs

- "In considering whether to seek costs, staff would review the particular circumstances of each case to come to determine whether the community group fell within the classification of a "public interest litigant" and, thus, whether it would be appropriate to seek costs against it. Ultimately, of course, even if the City sought costs, it would be for the Court to determine if the community group met the definition of a public interest litigant
- With respect, I would submit that this is exactly the approach that ought to be avoided by City Council.
- By leaving a discretionary decision in the hands of City lawyers as to whether or not it is appropriate to seek costs, the "chill" or deterrent effect will continue to present obstacles before community groups who seek to challenge City decisions

Conclusion

- To conclude, I would simply like to assert that judicial proceedings, whether before a tribunal or a court, whether at trial or on appeal, all form part of our democratic process. The City ought to encourage participation in all aspects of the democratic process.