COURT FILE NO: 07-DV-1363

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

THE GREENSPACE ALLIANCE OF CANADA'S CAPITAL

Applicants

- and -

CITY OF OTTAWA, 1374537 ONTARIO LTD.
and FINDLAY CREEK PROPERTIES LIMITED

Respondents

COST SUBMISSIONS OF THE APPLICANTS,

THE GREENSPACE ALLIANCE OF CANADA'S CAPITAL

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1. The Applicant makes the following cost submissions in response to those provided Respondents, the City of Ottawa, and 1374537 Ontario Ltd./Findlay Creek Properties Limited, respectively.

2. The Applicant, a non-profit environmental group of limited financial means, is a public interest litigant. The issues in dispute are matters of broad social significance, and qualify these proceedings as public interest litigation.

3. As a result, the Applicant submits that there should be no application of the "normal" or "two-way" costs approach as suggested by the Respondents, which presumes that entitlement and liability for costs accords with the success or failure of the litigation. The Applicant respectfully requests that this Court exercise its discretionary authority to dispense with any cost award, in view of the fact that public interest litigation requires special costs treatment in accordance with contemporary jurisprudence and doctrine.

4. First, the Applicant notes that the *Courts of Justice Act* confers a wide discretion upon Courts in considering appropriate cost awards. In particular, it states that "the court may determine by whom and to what extent the costs shall be paid".

***Courts of Justice Act*, R.S.O. 1990, c. C.43, section 131(1), TAB 1**

5. The relevant procedural rule dealing with the Court's discretion to award costs is rule 57.01, which reveals the breadth of matters that the Court may consider in exercising its broad discretion. In particular, this rule states that the Court may consider not only the principle of indemnity, but also the importance of the issues, the conduct of any party, and "any other matter relevant to the question of costs".

***Rules of Civil Procedure*, Rule 57.01, TAB 2**

6. By way of context, the Applicant submits that in terms of the courts' role in promoting access to justice, academics have argued that establishing a more coherent and predictable public interest costs jurisprudence is "the most critical variable affecting the long-term health of public interest litigation".

C. Tollefson, D. Gilliland and J. DeMarco "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 *Can. Bar. Rev.* 607, TAB 3

7. The Applicant submits that courts are becoming increasingly attuned to using cost awards as a policy instrument to enhance access to justice. In support of this position, the Applicant cites the Supreme Court of Canada's decision in *B.C. v. Okanagan Indian Band*, where it endorsed the policy that costs in public interest litigation require special treatment.

***British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, TAB 4**

8. The *B.C. v. Okanagan Indian Band* decision involved four First Nations bands who were logging on Crown lands they claimed as part of their aboriginal title, and who were faced with a stop-work order pursuant to the provincial *Forest Practices Code*. When the province sought an order to have the proceedings remitted to trial, the impecunious bands argued that if such an order were granted, they ought to be granted interim costs so that they might pursue the case.

9. Although this case dealt specifically with interim costs, LeBel J. for the majority made more general assertions about cost awards. In particular, at paragraph 22, LeBel J. for the majority noted that "indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award." Furthermore, at paragraph 27, LeBel J. stated that "another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common..."

10. Finally, the Applicant notes how, at paragraph 38, LeBel J. stated that "the more usual purposes of cost awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of case of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of

those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes." (emphasis added)

11. The Applicant also relies on the judgment of Perell J. of the Ontario Superior Court in *Incredible Electronics*, a pioneering decision in that it: 1) mounts a sustained critique of the inconsistent judicial treatment of costs in public interest cases; and, 2) proposes a new framework for the adjudication of costs issues in such cases. The Applicant submits that this honourable Court should build upon Perell J.'s analysis and adopt his approach to costs assessment.

> ***Incredible Electronics Inc. et al. v. Attorney General of Canada et al*, (2006), 80 O.R. (3d) 723. (Ont.S.C.J.). ("*Incredible Electronics*"), TAB 5**

12. *Incredible Electronics* determined a costs motion in relation to a dispute concerning the grey and black market distribution of satellite broadcast signals. Although the application was dismissed before it could be argued, the merits concerned the application of the *Charter* to strike down parts of the *Broadcasting Act* which purportedly restricted the freedom of expression of Canadians to receive television programs by satellite transmission. In terms of the costs dispute, however, the case involved the question of whether an unsuccessful litigant of possibly ordinary means should pay costs to successful litigants of extraordinary means.

13. Having noted at paragraph 71 the Ontario Law Commission's support for a one-way approach to costs (an approach under which public interest litigants are shielded from adverse costs liability if they lose but are compensated for their costs if they prevail), Perell J. pointed to two preconditions that, combined, would justify a special costs order: the public interest litigation (or importance) test and the public interest litigant (or eligibility) test.

14. The first precondition relates to the nature and significance of the issue(s) at stake in the litigation. This "matter of public importance" inquiry focuses on the significance of the litigation not only to the parties but to the broader community (see paragraphs 91-92).

15. The Applicant submits that the case at bar raises important questions of law and policy, particularly in relation to: a) the protection of Ontario's wetlands through the planning process; b) the legal force of the Provincial Policy Statements in relation to the *Planning Act* and the City of Ottawa's Official Plan; c) the ability of public interest litigants to obtain a fair hearing through adequate document disclosure.

16. The significance of Ontario's wetlands is well-understood: wetlands are essential ecosystems and parts of ecosystems. They provide continuous, sustainable environmental, economic and social benefits that contribute to the high quality of life in Ontario. Not all of these benefits are easily translated into economic or

human-related values. Some are of intrinsic ecological importance. Clearly, wetland protection is a matter of broad social significance.

17. The Applicant further reminds this Court that the purpose of its judicial review application was to challenge both procedural and substantive aspects of the Ontario Municipal Board's decision in relation to City of Ottawa zoning bylaws affecting a Provincially Significant Wetland. Specifically, the Applicant sought the implementation of section 2.1.3 of Provincial Policy Statement, 2005, which prohibits development and site alteration in significant wetlands. The Applicant also sought the implementation of section 4.2 of PPS, 2005, in accordance with Section 3 of the *Planning Act*, which specifies that a decision of a municipality or the Ontario Municipal Board "shall be consistent with" with the PPS, 2005.

> **Provincial Policy Statement, 2005, Order-in-Council No. 140/2005, see TAB 24 of the Application Record;**
> ***Planning Act*, R.S.O. c.P. 13, see pages 35-36 of the Applicant's Revised Factum**

18. In short, the Applicant sought to determine the effect of the recent amendment of the *Planning Act* to require mandatory adherence to the PPS, 2005. Although previous jurisprudence (*McGregor v. Rival Developments Inc.* [2003] O.J. No. 3062) had interpreted the relationship between the *Planning Act* and the PPS, 1996, this decision was rendered at a time when the statute simply required authorities to "have regard" for the policy statement. Given the change of circumstances, the Applicant brought forward a new and relevant question of law for consideration by the Divisional Court.

19. Furthermore, as noted by the Applicant during pleading on the Respondent's mootness motion, this question of law was not an isolated one. Indeed, the applicability of the PPS, 2005 in the context of developments in other Provincially Significant Wetlands has been raised in at least one other dispute, notably in a notice of appeal of an official plan amendment in the United Counties of Stormont, Dundas and Glengarry (allowing residential development in the Bainsville Bay Marsh Wetland). Thus, the Applicants submit that this question of mandatory wetland protection provided by the combined provisions of the PPS, 2005 and the *Planning Act* is an issue of public importance that is likely to arise frequently.

20. As such, the Applicant believes that it has met the standard set by Perell J. in *Incredible Electronics* in relation to establishing the broader significance of the questions raised in their application.

21. With respect to the second stage of inquiry related to eligibility, Perell J. at paragraph 94 articulated two defining characteristics of the public interest litigant: a) partisans in a matter of public importance; and b) little to gain financially from participating in the litigation. At paragraph 99, he stated that "sometimes a relevant but not determinative feature is that the public interest litigant is either

the "other", a marginalized, powerless, or underprivileged member of society or the public interest litigant speaks for the disadvantaged in society..."

22. As discussed previously in paragraph 16, the Applicant asserts that it is a partisan in a matter of public importance related to wetland conservation, and it has no direct, pecuniary or other material interest in this proceeding. Paragraphs 6-8 of Erwin Dreessen's affidavit sworn on June 13, 2008 in support of the application indicate that the Greenspace Alliance was formed by a group of concerned and environmentally-engaged citizens in 1997, and was incorporated as a federal non-profit organization in 2003. The Applicant is a leading advocate of local greenspace preservation and expansion, an environmental group that has consistently been active in Ottawa-area planning issues, providing comments and making submissions to all levels of government, including the City of Ottawa, the National Capital Commission, and the Ontario ministries of Environment and Natural Resources. The range and depth of the Applicant's public interest activities were more fully articulated at paragraph 8 of the affidavit of Erwin Dreessen. In short, the Applicant makes an important contribution to local environmental issues through its volunteer efforts. The case at bar was an example of the issues of public significance that it works on.

23. The Applicant emphasizes that its financial means are very limited. Although no financial statements form part of the application record, the Greenspace Alliance's 2007 Report is provided at Tab C of Dreessen's affidavit, and this report notes the $700 received through its main fundraising activities last year. The implications of this fundraising effort are obvious. Furthermore, the Applicant was only able to bring its appeal before the OMB, and this application before the Divisional Court, because it received *pro bono* counsel services from the uOttawa-Ecojustice Environmental Law Clinic.

24. A cost award on the basis suggested by the Respondent, namely on a partial indemnity scale in relation to the Application and on both a partial and substantial indemnity scale in relation to the Motion to Quash, even with the reduction of costs suggested at paragraph 16 of their cost submissions, would deal a crippling blow to the Applicant. Indeed, it is likely that the Applicant would be forced to declare bankruptcy if such an award was granted. It is submitted that such grave consequences ought to be considered by this Court in assessing costs.

25. The Applicant notes that at paragraph 100 of the *Incredible Electronics* decision, Justice Perell states:

> A related contentious point about the traits of a public interest litigant, and one that is relevant to the rationale for a special rule for public interest litigants, is the relevance of their financial situation and their tolerance for financial obligations and financial risk. Once again, this factor may be a relevant but not determinative measure of whether a litigant qualifies as a public interest litigant. A few public interest litigants may be affluent and be prepared to use their wealth to be a litigant in public interest litigation. A few public interest litigants may be subsidized by government programs or by lawyers willing to

> provide their services *pro bono*. It seems to me that the point is not so much whether the public interest litigant is affluent or impecunious but whether having regard to the benefit of ensuring their participation, they ought to be immunized from an adverse costs consequence.

26. By way of conclusion, the Applicant notes that it is a committed group of citizens who have invested significant time, energy and financial resources in defence of the Leitrim Wetland. The Applicant has behaved responsibly through this judicial review process, and has not engaged in any conduct that could be deemed abusive, vexatious or dilatory. The Applicant submits that it is deserving of a special costs order that does not provide for any amount "following the event" in favour of the Respondent. As a regular and constructive contributor to environmental and planning issues in Ontario, an adverse costs award would likely deliver a fatal blow to a functioning and important component of civil society, and would discourage participation in administrative and judicial proceedings by similar non-governmental groups in the future. The Applicant should therefore not be held liable for any of the Respondent's costs in relation to this judicial review application.

DATED: Ocotober 27, 2008

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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PROCEEDING COMMENCED AT OTTAWA

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