

Costs Requests against Community and Resident Public Interest Groups at Public Tribunals

Date:	May 8, 2009
To:	Executive Committee
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

At the January 27 and 28, 2009, City Council meeting, Council referred Motion MM30.9 to Executive Committee, which recommended that the City Solicitor provide a report to Council, through the Executive Committee, with respect to the City of Toronto's (the "City") policy on seeking litigation costs against community and resident public interest groups at public tribunals.

This report recommends that City Legal Staff continue to have authority to exercise their discretion in determining whether to make a request for litigation costs against community and resident public interest groups.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Legal Staff continue to have authority to exercise their discretion in determining whether to make a request for litigation costs against community and resident public interest groups at public tribunals.

FINANCIAL IMPACT

The Recommendations have no financial impact beyond what has already been approved in the current year's budget.

COMMENTS

Overview

Although the City participates in matters before various tribunals, the issue of the City's policy with respect to Legal Staff seeking costs against community and resident public interest groups at public tribunals is particularly relevant and timely in the context of matters before the Ontario Municipal Board (the "Board") for two reasons. First, community and resident public interest groups are more likely to be involved in matters before the Board than before other tribunals due to the inherent public interest component of the subject matter dealt with at the Board. Second, the Council Motion that instructed the City Solicitor to report on this matter arose following a significant decision from the Board, namely *Kimvar Enterprises Inc. v. Innisfil (Town)* (discussed below). Therefore, although the motion expressly refers to "tribunals" in a more generic manner, this report considers the issue of seeking costs against community and resident public interest groups in relations to matters before the Board.

Statutory Jurisdiction to Award Costs at the Board

The Board's jurisdiction to award costs is found in the *Statutory Powers and Procedures Act* (the "SPPA") and the *Ontario Municipal Board Act* (the "OMB Act"). The SPPA provides, pursuant to subsection 17.1(1), that a tribunal may, in the circumstances set out in its rules, "order a party to pay all or part of another party's costs in a proceeding." The SPPA, however, provides that a tribunal may only order a costs award where the conduct or course of conduct of a party has been "unreasonable, frivolous or vexatious or a party has acted in bad faith" and "the tribunal has made rules under subsection (4)" (subsection 17.1(2)). Subsection 17.1(4) provides that a tribunal may make rules with respect to the ordering of costs, the circumstances in which costs may be ordered, and the amount of costs. Section 23 of the SPPA also provides a tribunal with the discretion to "make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

The SPPA gives tribunals a general power to determine its own procedures and make rules for that purpose (section 25.1). The SPPA also provides that this power to make rules is in addition to any power to adopt rules that the tribunal may have under another Act which the case of the Board is the OMB Act. Pursuant to section 91 of the OMB Act the Board may make "general rules regulating its practice and procedure" and section 97(2) of the provides that the Board has the discretion to order "by whom and to whom any costs are to be paid"

The Board's Rules of Practice and Procedure

Under the authority of the OMB Act and the SPPA the Board made the Rules of Practice and Procedure (the "Rules"). Section 103 of the Rules provides that the Board "may

only order costs against a party if the conduct or course of conduct of the party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith.” Section 103 goes on to provide the following examples of unreasonable, frivolous, vexatious or bad faith conduct:

- (a) failing to attend a hearing event;
- (b) failing to give notice without adequate explanation, lack of co-operation with other parties during pre-hearing proceedings, changing a position without notice to the parties, or introducing an issue or evidence not previously mentioned or included in a procedural order;
- (c) failing to act in a timely manner or failing to comply with an order of the Board;
- (d) a course of conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
- (e) failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Board has determined to be improper;
- (f) failing to make reasonable efforts to combine submissions with parties of similar interest;
- (g) acting disrespectfully or maligning the character of another party; and
- (h) knowingly presenting false or misleading evidence.

Section 103 also indicates that the Board is not bound to award costs when any of these examples occur and that if a party requesting costs has also conducted itself in an unreasonable manner may decide to reduce the amount awarded.

Costs Awards at the Board

The recent 2009 decision of *Kimvar Enterprises Inc. v. Innisfil* (“*Kimvar*”) was a significant decision on costs wherein a developer made an application for costs against a number of parties, one of which was a residents association, in the amount of 3.2 million dollars following a successful appeal. Following a lengthy and reasoned analysis of cost awards at the Board, the Board dismissed the application for costs.

The Board began its costs analysis with a good summary of the Board’s practice with respect to awarding costs. The Board noted that costs awards are ‘rare’ and may be ordered where the conduct of a party has been unreasonable, frivolous or vexatious or the party has acted in bad faith:

...unlike the courts, applications for costs are not routine, and costs awards are rare. In short, a successful party appearing before the Board should have no expectation that it will recover its costs. The Board “does not award costs lightly and it does not award costs automatically. Decision after decision, the Board has expressed a sensitivity to the right of appellants to bring matters before this Board.”... Nevertheless, the Board has also concluded that parties must be accountable for their conduct and if that conduct or course of conduct has been unreasonable, frivolous or vexatious, or if the party has acted in bad faith, then the Board may order costs.

The Board proceeded to review the traditional ‘reasonable person’ test for determining whether conduct is clearly unreasonable:

The test for clearly unreasonable conduct that is most often cited in Board decisions is: would a reasonable person, having looked at all the circumstances of the case, conclude the conduct was not right, the conduct was not fair and that person ought to be obligated to another in some way for that kind of conduct...

The Board also noted that costs awards are not intended to indemnify successful parties and that cost awards against the public are extremely rare, cannot be used to deter public participation, and are only awarded where the conduct complained of is “so improper it cannot be ignored”. The Board wrote as follows:

Awards of costs are rare and costs are not intended to be used as indemnification to a successful party...The Board agrees with Mr. Rudy’s submission that the Board takes a cautious approach to cost awards against citizens and strives to accommodate public participation in land use planning decisions. In fact, in the very limited number of cases where awards of costs have been made against citizens, amounts have always been nominal. This is entirely consistent with how the Board has typically proceeded: costs cannot be used as a threat to deter public participation; and costs will only be awarded (whether the parties are commercial entities, ratepayers or citizens) where the conduct complained of is so improper that it cannot be ignored...

The Board proceeded to note that the public interest impact of a cost award is a relevant factor in the Board’s determination of whether to award costs:

...Nonetheless, there is no question that the claim is unprecedented and the Board finds that an award of costs anywhere near the amount requested would create a chilling effect. In this regard, the Board adopts Mr. Rudy’s submission that the public interest impact of a cost award is a relevant factor for the Board to consider in exercising its discretion. It is for this reason that the Board has restricted awards of costs to the clearest of cases, where the conduct complained of is unreasonable and improper.

The Board concluded by reinforcing the rarity of costs awards at the Board and emphasizing that the public should not be fearful of participating in Board proceedings:

The decision in this matter is intended to reinforce and reiterate the Board's practice that costs are not awarded lightly nor are they awarded routinely. Awards of costs are rare, especially proportionate to the number of cases decided by the Board. Potential parties and the public should not be fearful of participating in Board proceedings, a sentiment that has been expressed in decision after decision. Costs should never be used as a threat or a reason to dissuade public participation. The Board has the statutory jurisdiction to award costs for the purpose of controlling its process. Costs before the Board have never been intended to follow "the cause" nor are they intended in any way to indemnify a successful party. Each application for costs is decided on its own merit, based on an assessment of conduct.

Summary

In summary, the Board's Rules and the case law establish the following basic principles with respect to costs awards:

1. Costs applications are not routine and cost awards are rare;
2. Unlike in the court setting, costs at the Board are not intended to indemnify a successful party, they are based on an assessment of conduct;
3. Costs are only awarded where the conduct of a party is clearly unreasonable, frivolous and vexatious or done in bad faith;
4. The traditional test cited for clearly unreasonable conduct is: would a reasonable person, having looked at all of the circumstances of the case, conclude the conduct was not right, the conduct was not fair and that person ought to be obligated to another in some way for that kind of conduct;
5. The Board has been clear that awards of costs against the public or ratepayers are extremely rare and cannot be used to deter public participation; and
6. The public interest impact of a cost award is a relevant factor for the Board to consider in exercising its discretion.

As a result of the strict construction of the Board's Rules with respect to costs awards and the case law interpretation of those Rules, it is very rare that an award of costs is ordered by the Board. It is also highly unusual that City Legal Staff make such applications before the Board. City Legal Staff only make applications for costs awards where the conduct of a party is clearly unreasonable, frivolous and vexatious or done in bad faith.

As noted above, such conduct may include acting disrespectfully or maligning the character of another party, failing to attend a hearing event, or knowingly presenting false or misleading evidence.

It is important that, in those rare circumstances where the conduct is “so improper it cannot be ignored”, regardless of whether or not the party whose conduct is being complained of is a community or resident public interest group, City Legal Staff have the option of requesting costs to ensure that parties are accountable for their conduct.

The City Solicitor, therefore, does not recommend a blanket prohibition on City Legal Staff making a request for costs at the Board. Further, the City Solicitor recommends that City Legal Staff continue to have authority to exercise their discretion in determining whether to make a request for costs against community and resident public interest groups at the Board.

CONCLUSION

The City Solicitor recommends that City Legal Staff continue to have authority to exercise their discretion in determining whether to make a request for litigation costs against community and resident public interest groups at public tribunals.

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SIGNATURE

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