Court File No.: 19-81809

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF OTTAWA

Applicant

- and -

CLUBLINK CORPORATION ULC

Respondent

- and -

KANATA GREENSPACE PROTECTION COALITION

Intervenor

COSTS SUBMISSIONS OF THE INTERVENOR KANATA GREENSPACE PROTECTION COALITION

April 19, 2020

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1. No Entitlement to Costs from the Intervenor

1. The "general rule" is that an intervenor is neither liable for, nor entitled to costs.[1] This general rule applies both in the public and private interest contexts (i.e. regardless of whether the added party is intervening in support of a private interest or the public interest).[2] Courts apply a number of factors in deciding whether to deviate from the general rule, including: 1) nature and extent of the intervenor's interest in the issues that were before the court and in the outcome of the proceeding; 2) the nature and extent of the intervenor's involvement in the proceeding; 3) the intervenor's resources; and 4) whether the intervenor was successful on the merits.[3]

1.1. The Intervenor Had a Real Interest in the Outcome of the Proceeding

2. The Coalition, as a group of community members and neighbourhood organizations, represented the interests of citizens concerned about the potential loss of their neighbourhood greenspace. Given the positive outcome of the proceeding, the Intervenor would normally have been entitled to its costs, despite the Coalition not having a "direct financial involvement in the proceeding."[4]

1.2. Success on the Merits

3. ClubLink was not successful on the application vis-à-vis the Coalition, let alone substantially so.[5] Since the question of whether there has been "substantial success" is often measured against the relief sought,[6] ClubLink's lack of success in relation to the Coalition is evident in the draft judgment prepared by ClubLink, which confirms that ClubLink failed to achieve any relief against the Coalition in relation to the restrictive covenant.[7]

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[1] *Daly v. Ontario Secondary School Teachers' Federation*, 1999 CanLII 7319 at para. 6 (Ont. C.A.); *Harper v. Harper*, [1980] 1 S.C.R. 2 at p. 16; *Ogichidaakwe (Grand Chief), et al. v. Ontario Minister of Energy, et al.*, 2015 ONSC 7582 at para. 8 (Div. Ct.), citing Perell and Morden, The Law of Civil Procedure, Second Edition LexisNexis, Canada Inc. 2014 at p. 363, para. 4.376; *Young v. Young*, [1993] 4 S.C.R. 3 at p. 138; *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.*, 2004 CarswellOnt 6457 at paras. 4, 6, 8-9 (Sup. Ct.), **Appendix "B".**

[2] *Canadian Union of Postal Workers v. Her Majesty in Right of Canada*, 2017 ONSC 6503 at paras. 25, 28.

[3] *Ibid*. at para. 31.

[4] *Hines v. Nova Scotia (Registrar of Motor Vehicles)*, 1990 CanLII 2601(N.S. Sup. Ct.); see also *Guardian Insurance Co. of Canada v. York Fire & Casualty Insurance Co.*, 1992 CarswellOnt 5238 at paras. 1-2 (C.A.), **App. "C"**; *Lavigne v. O.P.S.E.U.*, 1989 CanLII 4087 (Ont. C.A.), aff'd 1991 CanLII 68 (S.C.C.); *Incredible Electronics Inc. v. Canada (Attorney General)*, 2006 CanLII 17939 at para. 115-17 (Ont. Sup. Ct.).

[5] *539618 Ontario Ltd. v. Stathopoulos*, 1992 CanLII 7617 (Ont. C.A.).

[6] See e.g. *Losereit v. Losereit*, 1994 CanLII 835 (Ont. C.A.).

[7] Draft Judgment, **App. "D".**

4. In this regard, the Coalition's alternative arguments should not be considered superfluous; they were only rendered "superfluous" given the City's success. Success should therefore be considered to have been divided on the restrictive covenant. Similarly, considerable time was devoted in the factums and at the hearing on the issue of severance. This argument was specific to the Coalition, as the City's application targeted the validity of certain clauses of the 1981 Agreement. Because the Court found that the clauses at issue were valid, there was no need to consider severance. As a result, the Coalition's arguments became moot on account of the Court's disposition on the main issue.

1.2.1. Other Issues Raised in the Application

5. Aside from the above, the Coalition devoted a significant part of its submissions in its reply factum and at the hearing to the characterization of the Agreement. Whereas ClubLink characterized the Agreement as being an agreement about the operation of a golf course, the Coalition strongly asserted that the focus of the Agreement was on the provision of greenspace. The Coalition also made submissions on fettering and *vires,* which applied to the Agreement as a whole. All of the foregoing was accepted by the Court.

1.2.2. Motion re Concept Plan

6. The motion to have the Concept Plan introduced should never have been necessary. ClubLink filed the 2005 OMB decision and had the tribunal file, which included the Plan, but failed to bring it to the Court's attention. Once the document was obtained by the Coalition in the late fall of 2020, the Coalition felt obligated to submit a relevant document to the Court. While ultimately deemed unnecessary, it was properly put before the Court. Moreover, ClubLink did not respond to the motion beyond a letter and case conference. Any costs incurred ought to have been minimal.

2. Quantum

7. In the alternative, should the Court decide that ClubLink be awarded costs, they should be reduced by 50 percent to reflect the high hourly rates and insufficient delegation on the file.

2.1. Hourly Rates

8. As was confirmed by Mew J. in *Canfield* "the [hourly] rates used for fixing costs should have regard to what clients typically pay. That will vary with the type of work, geographic location and the type

of client among other factors."[8] There, the Court reduced the hourly rate of senior counsel that had been described as "Toronto-esque" to $400 to reflect the local market.[9] More recently, Gomery J. considered costs of Toronto counsel in an Ottawa civil proceeding also touching on municipal law. She held as follows:

> *The rates charged by Charlesfort's lawyers reflect its decision to retain Toronto counsel. The proceedings were filed in Ottawa, all of the events giving rise to the litigation took place in Ottawa, and many competent litigation lawyers practice in the region. The rates of Toronto counsel are generally much higher than the rates typically charged by litigation lawyers in Ottawa... The cost consequences of this choice should not however be borne by the City.*[10]

9. Counsel for ClubLink were from Toronto and charged hourly rates of $985, $640 and $675 for Mr. Gottlieb, Mr. Flowers and Mr. Renihan respectively. These rates are well in excess of the hourly rates that a litigant in Ottawa would expect to pay.[11] ClubLink has not argued that there are no competent counsel in municipal law and commercial litigation in Ottawa, nor would such an argument have merit. Based on a standard rate of $500-600 per hour for a senior litigator in Ottawa,[12] the Coalition submits that ClubLink's fees should be reduced by 30 percent to reflect the Ottawa market.

2.2. Insufficient Delegation

10. ClubLink's bill of costs evidences an insufficient level of delegation. Its primary timekeepers on the file were all partners, who did most of the work. While a client may choose to have senior counsel on the file exclusively and attend all aspects of it, they cannot expect the party paying costs to be responsible for such fees.[13] ClubLink's fees should accordingly be further reduced by 20 percent, for a total of 50 percent.

3. Conclusion

11. No costs should be awarded against the Coalition. The Intervenor supported the City, who ultimately prevailed against ClubLink. The Coalition nevertheless requests its costs on a partial indemnity basis for the preparation of the costs submissions ($2,486.00, inclusive of HST), as the submissions should have been unnecessary.

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[8] *Canfield v. Brockville Ontario Speedway*, 2018 ONSC 3288 at para. 23, emphasis added.
[9] *Ibid.* at paras. 19-24.
[10] *Charlesfort Developments Ltd. v. City of Ottawa*, unreported at para. 8 [*Charlesfort*], **App. "E".**
[11] See Coalition's Bill of Costs, **App. "A".**
[12] *Charlesfort* at para. 8-9, 17.
[13] *Duby et al v. 1583170 Ontario Inc. et al*, 2018 ONSC 6176 at para. 17; see also *Charlesfort, ibid*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of April 2021.

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