

DATE: 2021/06/16

SUPERIOR COURT OF JUSTICE

HEARD: in writing

[1] The Court has just become aware that the appeal of this matter is proceeding this week, on an expedited basis. There is an outstanding matter, being the claim for costs by ClubLink Corporation ULC (“ClubLink”) against the Intervenor, the Kanata Greenspace Protection Coalition (“Coalition”). Those written submissions were recently received by the Court. A brief ruling on this issue may be helpful to the panel of the Court of Appeal for Ontario hearing this appeal.

[2] Clublink has claimed costs against the Coalition on the following basis:

- a. The issue of costs was left open by Justice MacLeod leaving it for the Application Judge to “determine if the participation by the Coalition drove up the costs of either of the parties and how to respond if that proves to be the case”: see *City of Ottawa v. ClubLink Corporation ULC*, 2019 ONSC 7470, at para. 29.
- b. That the Coalition’s arguments were rejected in its claims as being the beneficiary of two different restrictive covenants and that they were found to be superfluous to the issues as determined.
- c. That the Coalition’s position was irrelevant.
- d. That the Coalition’s participation increased ClubLink’s costs.
- e. That the sum of \$50,000.00 is reasonable in the circumstances.

[3] The Coalition responds by stating:

- a. The general rule is that an intervenor is neither liable for, nor entitled to costs and that this applies both in the public and private interest context.
- b. The Intervenor had a real interest in the outcome of the proceeding
- c. That Intervenor’s arguments were only rendered superfluous given the City’s success in upholding the validity of the subject agreements;
- d. That the Intervenor was successful in opposing arguments on fettering and vires which impacted the agreements that the Coalition was relying upon in its claim for restrictive covenants.
- e. That the motion to admit fresh evidence required brief written submissions for which the time spent by Clublink was minimal.
- f. That the quantum of ClubLink’s costs is excessive.

Analysis

[4] I have considered the following principles in my decision to award costs:

- The *Courts of Justice Act*, R.S.O. 1990, C. C.43 (“CJA”) provides:

131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[5] The Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579, articulated the principles that govern costs assessments. Armstrong J.A. stated: “When the court awards costs, it shall fix them in accordance with sub-rule 57.01(1) and the Tariffs...Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *CJA*.” Further, the Court of Appeal in *Boucher* stated that the assessment of costs is not a mechanical issue. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant: (see *Boucher*, at para. 26).

[6] In exercising my discretion with respect to the costs of this proceeding, I have considered the factors set out in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and make the following findings to those factors which are the most relevant in this matter:

1. *Result*: I am of the view that the result is divided. The Coalition’s arguments were rendered superfluous but only as a result of ClubLink’s failure to obtain a declaration of unenforceability of the subject agreements. Otherwise, the Coalition’s arguments on the restrictive covenant would have been fully dealt with by the Court although the Court had concerns on the evidentiary record.

Also, I am of the view that the Coalition shares in the City’s success on the issues of fettering and *vires*.

With respect to the motion to file additional evidence, there is no doubt that the Coalition was not successful. However, I do not fault them for bringing that motion. The evidence surrounding the Concept Plan was effectively a gap in the evidence as it was not part of the record and the Coalition’s attempt to identify that missing document was well intentioned. ClubLink’s costs associated with that request were minimal.

2. *Offers to Settle*: Neither party directed me to any offers to settle.

3. *Costs of the Unsuccessful Party and Reasonable Expectations*: As my decision is based on Clublink's entitlement to costs, the issue of quantum is not relevant.
4. *Importance of the Issues*: The issues were obviously important to the parties and particularly to the members of the Coalition who stood at risk of seeing the area surrounding their residences change significantly.
5. *Complexity*: This was complex litigation. There were substantial materials which included lengthy affidavits, cross-examinations and detailed facts. The law on the rule against perpetuities, the municipal issues raised and questions surrounding restrictive covenants are not commonly applied and added much complexity.
6. *Conduct*: The parties conducted themselves properly in this hard-fought litigation. I specifically disagree with ClubLink that the Coalition's position was irrelevant.

[7] When considering the previous endorsement of Justice MacLeod, I do not interpret his words as stating that if the Coalition's participation increased ClubLink's costs that ClubLink could seek to recover them. It is implicit in the fact that the Coalition was given intervenor status that there would be additional costs. It is clear in Justice MacLeod's endorsement that the Coalition was seeking address issues surround the restrictive covenants and that the Coalition would add to each party's costs. Notwithstanding, that intervention was deemed appropriate. Where Justice MacLeod speaks to driving up the costs of the other parties, that this would be a reference to increasing the costs beyond that which would be normally expected.

[8] The fact that Justice MacLeod refused to grant what he called a "prophylactic costs award" to insulate the Coalition from a costs award was simply an acknowledgement that the Coalition's participation was based on that which was expected. As such, the reasonability of the Coalition's conduct would remain at issue.

[9] This leads me to comment on the conduct of the Coalition. Having given full consideration to ClubLink's arguments, I conclude that there is nothing in the manner in which the Coalition conducted itself in this litigation was improper, vexatious or unnecessary. I conclude that their participation fell exactly within the expectations of what the parties would have intended when the Coalition was granted intervenor status.

[10] This leads me to acknowledge that ordinarily, intervenors are neither awarded costs nor have costs awarded to them: *Daly v. Ontario Secondary School Teachers' Federation*, 1999 CanLII 7319, at para. 6 (Ont. C.A.). There was nothing in the manner in which the Coalition participated in this application that would take us out of the ordinary approach to costs against an Intervenor.

[11] In this case the Intervenor's participation was focussed, would have been more relevant had the outcome been different and it did not add to the cost of the litigation beyond that what would normally have been expected.

[12] ClubLink's request for a cost award against the Coalition is denied.

[13] As for the cost of these costs submissions, the appropriate result is for both parties to assume their own costs.



Justice Marc R. Labrosse

CITATION: *City of Ottawa v. ClubLink Corporation ULC*, 2021 ONSC 4352
COURT FILE NO.: 19-81809
DATE: 2021/06/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF OTTAWA

Applicant

– and –

CLUBLINK CORPORATION ULC

Respondent

– and –

KANATA GREENSPACE PROTECTION
COALITION

Intervener

COSTS ENDORSEMENT

Labrosse J.

Released: June 16, 2021