CITATION: *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 7160
COURT FILE NO.: 15-65299
DATE: 2016/11/17

SUPERIOR COURT OF JUSTICE – ONTARIO – DIVISIONAL COURT

RE: Douglas Cardinal, Douglas Cardinal Architect Inc., Romola V. Trebilcock Thumbadoo, Dan Gagne, Larry McDermott, and Richard Jackman, Appellants

AND

Windmill Green Fund LPV and City of Ottawa, Respondents

BEFORE: C.T. Hackland J.

COUNSEL: Michael Swinwood, for the Appellants

Ronald Caza and Katie Black, for the Respondent, City of Ottawa

Paul A. Webber, for the Respondent, Windmill Green Fund LPV

HEARD: In-Writing

COSTS ENDORSEMENT

[1] The appellants were not successful in their motion for leave to appeal to the Divisional Court from an Order of the Ontario Municipal Board. The Board, on a preliminary motion, had refused to hear the appellants' appeal and Notice of Constitutional Question regarding a City of Ottawa Plan Amendment and Bylaw passed to allow a future development of certain islands in the Ottawa River. These lands have particular significance to indigenous persons in Eastern Ontario. This Court's reasons are reported at *Cardinal v. Windmill Green Fund LPV*, 2016 ONSC 3456.

[2] The respondent, Windmill Green Fund LPV ("Windmill") and the City of Ottawa ("the City"), were successful in resisting the motion for leave and are presumptively entitled to their partial indemnity costs. The costs claimed by Windmill are $31,137.13 for fees and disbursements, and by the City are $27,963 fees and disbursements of $7,448.29. These claims are reasonable and in the normal course would be allowed given the importance and complexity of the issues raised, the substantial materials filed and a full day's argument in court.

[3] However, for the reasons discussed below, I accept the appellants' submission that they should be considered public interest litigants and thus no costs should be awarded against them.

[4] It is often difficult to determine who should be recognized as a public interest litigant. The case law has never defined specific criteria, rather there are recognized indicia which viewed collectively may qualify a party as a public interest litigant.

[5] Considerable assistance can be gleaned from the decision of Perell J. in *Incredible Electronics Inc. v. Canada (Attorney-General)* (2006) 80 O.R. (3d) 723. Perell J. defined public interest litigation as "litigation that involves the resolution of a legal question of importance to the public as opposed to private interest litigation, which, I will define as litigation that involves the resolution of a legal question of importance mainly only to the parties."

[6] At para. 71 of *Incredible Electronics*, the court stated:

> "It may be noted that a one-way regime approach was the recommendation of the Ontario Law Reform Commission. 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."

[7] I make the following observations applying the indicia identified by the OLRC and commented on favourably by Perell J.:

(a) **Issues of public importance extending beyond the immediate interests of the parties**: The appellants sought to raise issues as to the island's importance as an indigenous religious site and the implications for the proposed development which would flow from such a determination. The court agreed with the OMB's observation that the proper forum for such an argument is the Superior Court of Justice. Nevertheless, issues regarding indigenous religious sites are important issues of public interest extending beyond the interests of the parties to this proceeding.

(b) **The litigants have no personal, proprietary or pecuniary interest in the outcome of the proceeding**: The applicants were not putting forward any competing development project and have no financial interest in the matter. They sought an adjudication of whether the islands were historically an indigenous

sacred site and presumably would have sought a freeze on commercial and residential development of the type proposed in this project.

(c) **The issues have not been previously decided by a court in a proceeding against the same defendant(s)**: This indicia is technically satisfied. However, the respondents forcefully argued that the appellants' proposed OMB proceeding was not being pursued in good faith because at the time of the OMB decision to dismiss the proceeding, the appellants were pursuing the same issues in a Superior Court action (which was the proper forum for these issues and for the relief sought). The Superior Court action was then abandoned on consent on a without costs basis. I do see this as a factor weighing against the appellants position both on the merits of the motion for leave and on the present costs issue. On the other hand, there is a dearth of evidence about the Superior Court action and the circumstances of its abandonment. There was apparently no undertaking provided by the appellants to not pursue their claims in another forum.

(d) **The defendant has a clearly superior capacity to bear the costs of the proceeding**: The City and Windmill are certainly able to bear their own costs of the motion for leave. In contrast, Mr. Cardinal has provided affidavit evidence that he is currently in a strained financial situation for reasons he has satisfactorily explained and the other appellants are persons of very modest means.

(e) **The litigant has not engaged in vexatious, frivolous or abusive conduct**: As noted previously, this Court held that the OMB was the wrong forum for the arguments the appellants sought to advance, yet they abandoned their action in the Superior Court. On the other hand, the historical, cultural and constitutional submissions they sought to advance are certainly not frivolous or vexatious. As the appellants noted in their submissions, sacred site litigation is a developing aspect of indigenous law.

[8] In summary, in the Court's view the appellants generally satisfy the recognized indicia of a public interest litigant. The appellants are concerned individuals attempting to address indigenous issues of broad concern which may impact the public generally. It was evident from the materials provided to the Court that there are important indigenous historical connections to the islands where this development is proposed and indeed the respondents and the OMB were of

the view that the process followed by the City and Windmill and the nature of the development itself appropriately responded to these issues. These are matters of public importance. And as noted, the City and the developer are well able to bear their own costs.

[9] One matter which featured prominently in the OMB proceeding and the motion for leave before this Court, was the issue of who speaks for the Algonquin people whose historical interests are connected to these islands and are relevant to this project. The OMB found that appropriate consultations had taken place with the Algonquins of Ontario, an organization of ten Algonquin communities created for the purpose of negotiating a land claim with the Federal and Provincial governments. However, the appellants say this in their cost submission:

> There is serious division among the indigenous communities in the Ottawa River Valley as to this project. There is and will continue to be serious opposition to this project. Not all Algonquin communities actually value this project and are very suspect regarding so-called 'economic renewal.

[10] Accordingly, while it might be argued that the Algonquins of Ontario organization has the sole legitimate right to address the indigenous concerns relevant to this development, I would not see that as necessarily being the case. That organization should not be viewed as having the only legitimate voice so as to exclude other persons from advancing a legal position that can be characterized as in the public interest.

[11] For these reasons, the Court will recognize the appellants as public interest litigants in this proceeding and accordingly, there will be no order as to costs against the appellants.

[12] I would note that appellant's counsel, Mr. Swinwood, was required to retain counsel when an issue arose at the instigation of the respondent Windmill as to whether he (appellant's counsel) might be liable personally for costs pursuant to Rule 57.07(1) due to an issue that was subsequently not pursued. Appellant's counsel, Mr. Swinwood, asks for reimbursement of his personal costs incurred in the sum of $2,665.50 inclusive of disbursements and HST. This claim was not opposed. I will allow costs in this amount to be paid by Windmill Green Fund LPV to Mr. Swinwood.

Justice Charles T. Hackland

Date: November 17, 2016

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Released: November 17, 2016