

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: April 22, 2024

CASE NO(S):

OLT-22-003833

PROCEEDING COMMENCED UNDER subsection 20 of the *Ontario Land Tribunal Act*, 2021, S.O. 2021, c. 4, Sched. 6

Request by:

R.W. Tomlinson Limited

Request for:

Request for an Order Awarding Costs

Costs sought against:

Town of Greater Napanee & Keep Napanee Great

Heard:

March 07, 2024, in Writing

APPEARANCES:

Parties

Counsel

R.W. Tomlinson Ltd.
("Tomlinson/Moving Party")

M. Polowin
J. Polowin
K. Duquette

Town of Greater Napanee ("Town")

J. Ewart

Keep Napanee Great ("KNG")

R. Lindgren
J. Wilson

DECISION DELIVERED BY D. CHIPMAN AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The matter before the Tribunal arises out of a written motion for costs ("Motion") pursuant to Rule 23 of the Tribunal *Rules of Practice and Procedure* ("Rules") brought by R.W. Tomlinson ("Moving Party").

[2] By way of background, these proceedings originated pursuant to an appeal brought by Tomlinson under s. 34(11) and 41(12) of the *Planning Act* in relation to the Town's refusal to amend Zoning By-Law No. 02-22 ("ZBA") and pursuant to s. 41(12) of the Act on the Town's failure to consider the Site Plan Application within the legislated timeframe.

[3] The Moving Party sought a permanent asphalt plant on a portion of the lands to produce hot-mix asphalt ("HMA"). The HMA plant is to be located immediately adjacent to the R.W. Tomlinson Napanee Quarry, which is an active operating quarry licensed under the *Aggregate Resources Act*. The Moving Party also sought zoning permission to include, subject to a holding provision, a ready-mix concrete batching plant that was not specifically contemplated at the time of the appeal.

[4] The hearing commenced on Monday, August 14, 2023, for 10 days. Counsel provided their final submissions in writing on Friday, September 22, 2023. The Tribunal Decision was issued on Friday, December 22, 2023. The Decision allowed the appeal and ordered the Town to amend Zoning By-law No. 02-22 and further, it approved the site plan subject to the conditions set out in the Decision.

[5] On Thursday, February 29, 2024, the Tribunal received a Motion Record from Tomlinson seeking costs from the Town and KNG.

[6] The following materials were before the Tribunal for consideration:

- a) Notice of Motion, R.W. Tomlinson, including an Affidavit of Jara Hughes, sworn Thursday, February 29, 2024; and Affidavit of Craig Bellinger, sworn Monday, April 15, 2024;
- b) Response to Motion, the Town of Greater Napanee, dated Friday, March 15, 2024;

- c) Response to Motion, Keep Napanee Great, dated Friday, March 15, 2024;
and
- d) Reply Motion Record, R.W. Tomlinson, dated Friday, March 22, 2024.

THE MOTION IS FOR:

- a. An Order pursuant to s. 20 of the *Ontario Land Tribunal Act, 2021*, SO 2021, c 4, Sched. 6 (“OLT Act”) and Rule 23 of the Tribunal’s Rules of Practice and Procedure (the “Rules”) to fix Tomlinson’s costs related to extra preparation and hearing time for the above-noted appeals (the “Appeals”) at \$153,488.10, or in the alternative some other amount that the Tribunal may deem just;
- b. An Order awarding interest in accordance with the Rules;
- c. An Order pursuant to s. 20 of the OLT Act and Rule 23 of the Rules for the Town of Greater Napanee (the “Town”) and Keep Napanee Great (“KNG”) to pay Tomlinson’s costs on a joint and several basis;
- d. In the alternative, an Order apportioning Tomlinson’s costs between the Town and KNG as the Tribunal may deem just; and
- e. Such further and other relief as the Tribunal may deem just.

[7] In its materials, the Moving Party sets out a list of examples of conduct which, in its view, warrants an Order for costs against the Town and KNG, including the engagement in conduct that unnecessarily lengthened the hearing:

- a. The Town and KNG continuously raised evidence and arguments relating to Tomlinson’s quarry adjacent to the Subject Lands, notwithstanding that all Parties agreed (and the Tribunal repeatedly directed) that the quarry was not at issue in the hearing;
- b. The Town and KNG based their opposition to the Applications almost entirely on the allegation that the proposed HMA would exceed the applicable standards for air quality and acoustic impact. However, their

joint witnesses in these disciplines failed to tender any evidence that would allow the Tribunal to make such a finding;

- c. KNG failed to make reasonable efforts to combine its submissions with the Town, in that it took positions contrary to those taken by the Town.

[8] For the reasons and findings set out below, the Tribunal will not exercise its discretion to award costs in this instance.

STATUTORY FRAMEWORK

[9] The Tribunal's statutory authority to award costs is set out in s.20 of the OLT Act, and is consistent with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended. S. 20 of the OLT Act sets out the following:

The Tribunal may, subject to any other Act, fix the costs of and incidental to any proceeding, and order a party to the proceeding to pay the costs in accordance with the rules.

[10] Rule 23.9 and 23.10 of the Rules limit the Tribunal's discretion and provide the following guidance:

Costs

23.9 Circumstances in Which Costs Order May be Made The Tribunal may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith. Clearly unreasonable, frivolous, vexatious or bad faith conduct can include, but is not limited to:

- a. failing to attend a hearing event or failing to send a representative when properly given notice, without contacting the Tribunal;
- b. failing to give notice without adequate explanation, lack of co-operation with other parties during the 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 a procedural order or direction of the Tribunal where the result is undue prejudice or delay;

- 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 Tribunal 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;
- h. knowingly presenting false or misleading evidence; or
- i. breaching a confidentiality requirement of a mediation, settlement conference or of a decision of the Tribunal in the hearing of the merits.

23.10 Powers of Tribunal The Tribunal may deny or grant the application for costs or award a different amount and fix the costs of and incidental to a proceeding and direct payment be made by a certain date by order.

[11] In the view of this panel, based upon the Rule above, the jurisprudence of the Tribunal (and its predecessor, the Ontario Municipal Board) and the general observations of this Panel, the list can be further amplified by including the following behaviours:

- stubborn or willful ignorance;
- persistent disrespect exhibited in the course of the hearing *1353857 Ontario Inc. v. Ontario (Municipal Affairs)* 2019 CarswellOnt 21165;
- failures to abide by Tribunal orders and directions during and/or prior to the hearing *D. Crupi & Sons Limited v Toronto (City)*, 2020 CanLII 5751 (“*D. Crupi*”);
- using the appeal process for ulterior self-serving motives *Campione v. Vaughan* 2016 CarswellOnt 19377, 91 O.M.B.R. 439; *Hanover County Fair Plaza v. Hanover (Town)* 2006 CarswellOnt 1488; *Juch-Tech Inc. v. Hamilton (City)* 2015 CarswellOnt 11756; and
- maintaining unsupportable positions in the face of cautions from the Tribunal.

MOVING PARTY'S POSITION AND GROUNDS FOR COSTS

A) Failing to present evidence that could give rise to the relief requested

[12] The thrust of the Moving Party's position is that the Appellants acted unreasonably by pursuing an appeal that resulted in legal and consultant costs to respond to an appeal that had no reasonable prospect of success.

[13] The Moving Party alleges that the Town and KNG led evidence through their jointly retained witnesses on the grounds that the proposed HMA would lead to exceedances of Provincial standards in terms of both airborne emissions and acoustic impact, which they did not substantiate.

[14] The Tribunal conducted a lengthy, complex hearing, notwithstanding that the cases of the Town and KNG were based in large part on evidence that they knew or ought to have known was not capable of giving rise to the relief that they requested.

[15] The Moving Party submits that the Town and KNG are expected to be respectful of the adjudicative process, the resources of other Parties and the Tribunal. In this event, they did not, and as such, money was expended to defend an appeal that had no reasonable prospect of success.

B) Continuing to raise irrelevant evidence

[16] The Moving Party alleges that the Appellant's witnesses continually sought to tender evidence related to the functioning of the quarry in both their oral and written evidence they knew to be irrelevant, contrary to their witnesses' written agreements and the Tribunal's repeated direction. This necessitated extra preparation by counsel and witnesses and unnecessarily lengthened the hearing. Such conduct from sophisticated Parties cannot be considered right, fair, or reasonable.

C) Unreasonable Conduct by KNG

[17] KNG acted unreasonably in failing to make reasonable efforts to combine their submissions with the Town, notwithstanding that the Parties held similar interests. In particular, the Motion notes KNG's planner who continued to insist that an Official Plan Amendment ("OPA") was required to permit the proposed development, notwithstanding that the Town's planner, confirming that none was required.

[18] Finally, the Moving Party alleges that the Appellant's case, as presented, consisted of unfounded apprehensions and personal views on the proposed development, which were not substantiated in any meaningful way with supporting evidence, and were not considered helpful in determining the land use planning issues before it.

APPELLANT'S RESPONSE

[19] In their responses, the Town and KNG request that the Tribunal dismiss the Motion and order the Moving Party to pay the Town their costs of responding to the Motion.

[20] The Appellants state that the Moving Party should not have had any expectation of recovering their costs in this forum on the fact that the Appellant's appeal was unreasonable as it had no reasonable prospect of success. The Appellants argue that a Costs Motion is not the appropriate forum to argue the merits of the appeal, and the Moving Party should have brought a motion for dismissal if this was their primary concern.

[21] The position of the Appellants is that the conduct of their representative and the evidence submitted do not reasonably approach the serious misconduct of behaviour described in Rule 23.9 of the Rules that would permit an award of costs.

[22] Both the Town and KNG, emphasized that residents or the public engaging in the appeal process should not be deterred from exercising their rights to participate for fear of financial burden.

ANALYSIS AND FINDINGS

[23] The Motion Record now comes before the Tribunal Member who adjudicated the appeal. Of worthy note, is the fact that Town Planning Staff were in support of the application, as were the Town's peer reviewers, who raised no concerns. The appeal was based on the refusal of the application for a Zoning Amendment and Site Plan Application by Town Council through a resolution that was questioned by Tomlinson during the 10-day hearing as to its validity and correctness.

[24] It would be fair to say that this hearing ended up being a thoroughly contested battle. Vigour to achieve each Party's objective was apparent, examinations of witnesses were extensive, and cross-examinations were careful and intense.

[25] Although Tomlinson was successful in the appeal in and of itself before this Tribunal, that does not constitute a basis for an award of costs.

[26] As Counsel for the Town and KNG rightly point out, awards of costs in connection with Tribunal hearings are rare and dependent upon the facts in each particular case. This is always forefront when the Tribunal assesses these types of requests.

[27] In order to attract an award of costs, the Tribunal must find that the conduct of a Party has been unreasonable, frivolous, vexatious, or in bad faith. The type of conduct is disjunctive, and Rule 23.9 of the Rules makes it clear that the decision to award costs is discretionary.

[28] The accepted test for determining whether costs are warranted is set out in *Midland (Town) Zoning By-law 94-50, Re 1995 CarswellOnt 5227*. This often cited Decision sets out the ‘reasonable person’ test, which is expressed in the dictum of whether a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a Party proven at the hearing and the extent of his or her familiarity with the Tribunal’s procedure, exclaims, “that’s not right; that’s not fair; that person ought to be obligated to another in some way for that kind of conduct”.

[29] This appeal case displayed none of those hallmarks. This case showed knowledgeable objectors who prepared assiduously for the hearing and were well aware of the issues and obligations of a Party to a Tribunal proceeding. Civility was never in question in the course of the hearing. All counsel and all witnesses behaved properly and professionally. The Tribunal found no Party to this proceeding acted unreasonably and/or demonstrated any type of clear misconduct which rises to the level of the non-exhaustive list of examples set out in Rule 23.9.

[30] Much of the Moving Party’s arguments focused on the fact that the Appellant’s appeal had no reasonable prospect of success. However, this is not a relevant consideration in this Motion as the Moving Party attributes the meaning of “reasonable” to the appeal as opposed to the conduct of a Party.

Failing to present evidence that could give rise to the relief Requested

[31] All Parties approached these Tribunal proceedings with seriousness and, in so doing, had familiarized themselves with applicable legislation and policies, the Tribunal’s Rules and their own procedural and substantive responsibilities, including introducing relevant evidence to advance their position at a hearing. Whether their evidence could give rise to the relief requested or was insufficient to do so, was ultimately for the Tribunal to determine.

[32] The Tribunal agrees with the Town and KNG that a Motion for Costs is not the correct format to raise a claim that an appeal is unreasonable or has no reasonable prospect of success. Rather, claims of this nature should have been properly put forward in a motion for dismissal in advance of the Merit Hearing, or during the hearing itself.

[33] While it may be the Moving Parties' position that the Appellant's case as presented, consisted of unfounded apprehensions and personal views on the proposed HMA, the Tribunal heard the testimony of qualified experts and thoroughly examined and weighed the evidence of those qualified experts in coming to its conclusion.

Continuing to raise irrelevant evidence.

[34] Based on the evidence and submissions presented, the Tribunal finds that the Parties acted efficiently in progressing the matter. Due to the proximity of the Tomlinson Quarry being adjacent to the Subject Lands, there was crossover evidence presented, but none of which extended the hearing so significantly that a costs award would be qualified.

Unreasonable Conduct by KNG

[35] In being granted Party status at a prior Case Management Conference, KNG was directed to work with the Town to coordinate expert witnesses to reduce duplication. All experts between the Parties met prior to the hearing event. The differing of opinions by the expert on the Issues at hand is normal in the course of all contested hearings. Regardless of the Town's planner and KNG's planner having differing opinions on whether there was a need for an OPA, the Tribunal recognizes that KNG had the right to produce expert opinion evidence in support of their position. This was done efficiently. It is the Tribunal's findings that the time and effort put forward by Tomlinson to refute KNG's planner's evidence does not amount to a claim of unreasonable conduct on the part of the KNG.

[36] In conclusion, there are many circumstances where costs may be considered by the Tribunal under its *Rules*. However, this case is not one where the Tribunal is convinced that it should exercise its discretion to do so.

[37] The principles underlying the Tribunal costs jurisdiction was, is summarized in *2684360 Ontario Ltd. v. Kingston (City)*:

The right to costs is not routine, does not follow the cause, and awards of costs are rare. The approach of the Tribunal is to ensure that litigants are not dissuaded from exercising their right of appeal for fear of costs. However, each case is specific and despite the exceptional nature of a costs award, the Tribunal's Rules, and the approach of the Tribunal, recognize that parties must also be accountable for their conduct that is clearly unreasonable, frivolous, vexatious or in bad faith and there is not total immunity from costs claims.

[38] The above principle was further elaborated upon by the Tribunal in the matter of *Davidson v. McKellar (Township)*, which identified the following:

- a. The Tribunal's approach in considering cost awards is different from the Ontario Courts. An award of costs is not routine, and instead may be considered exceptional. Costs do not follow the cause, and costs are not awarded simply because the party was successful.
- b. The absolute requirement for an award of costs is that the party against whom the request is made, must have demonstrated conduct or a course of conduct of a party in the proceeding that has been "unreasonable, frivolous or vexatious" or the party has acted in bad faith. Absent such conduct, there can be no award of cost.

[39] The Tribunal's approach to costs is reflective of its administrative function, which differs from the approach taken by the Courts. The Tribunal's Practices and Procedures encourage public participation in the planning process and as such, costs awards must be approached with care to avoid a "chilling effect", and the Tribunal and its predecessors have consistently been mindful of this. The statutory scheme set out in the Act encourages public participation in the decision-making process surrounding land use planning matters in the Province through a public hearing process. The Tribunal

endeavours to facilitate public involvement in line with its Rules and emphasizes that costs should not be employed to discourage participation.

[40] In applying the objective reasonable standard, there is nothing that would lead a reasonable person to conclude that the totality of the Appellants' conduct in this proceeding was remarkably unreasonable, unfair, or such that it deserves to compensate Tomlinson with costs.

[41] Similarly, based upon the evidence or lack thereof, the Tribunal does not find that the conduct of the Moving Party rose to the high threshold required to warrant an award of costs. The Tribunal will not exercise its discretion to award costs against the Moving Party for the Appellant's costs incurred to respond to the Motion. The Tribunal was not presented with any evidence demonstrating that the Moving Party acted unreasonably or in bad faith in their pursuit of the Motion.

[42] Having considered all of the evidence, submissions and authorities presented by the Parties, the Tribunal finds that a reasonable person would not conclude that either of the Appellant's conduct constitutes unreasonable, frivolous, vexatious or bad faith conduct. Nor does the conduct of the Moving Party in bringing the Motion rise to the high threshold required for the Tribunal to invoke its discretion. As such, no award of costs is warranted against either the Appellants or the Moving Party.

ORDER

[43] **THE TRIBUNAL ORDERS** that the Motion is denied, and no costs are awarded.

“D. Chipman”

D. CHIPMAN
MEMBER

Ontario Land Tribunal

Website: olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal (“Tribunal”). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.