Court File No. M51535
Court File No. C68033

COURT OF APPEAL FOR ONTARIO

B E TW E E N :

TWO SISTERS RESORTS CORP. and SOLMAR (NIAGARA 2) INC.

Applicants
(Moving Parties)

- and –

THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE and SORE ASSOCIATION

Respondents
(Respondents on Motion)

APPLICATION under Rule 14.05 of the *Rules of Civil Procedure*, R.R.O 1990 Regulation 194, and under Section 273 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended

RESPONDING FACTUM OF THE RESPONDENT THE TOWN OF NIAGARA-ON-THE-LAKE MOTION FOR LEAVE TO APPEAL COSTS

July 13, 2020

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TABLE OF CONTENTS

PART I – OVERVIEW

1. The Applicants ("Moving Parties") purchased an historical property (the Rand Estate) for development purposes which they were aware would be subject to the protection of the *Ontario Heritage Act (*"OHA"*)*.[1] This process is initiated through the release of Notices of Intent to Designate ("NOIDs") under the OHA.

2. Rather than exhaust their rights under the OHA, the Moving Parties brought an application challenging the Town's resolution and by-law directing the issuance of the NOIDs. This was a serious attack on an issue of great importance to the Town by an experienced developer represented by sophisticated counsel.

3. The Moving Parties, who claim a genuine interest in settlement, continue to litigate at significant additional expense challenging the decision of the Application Judge on the merits (the "Merits Decision") and the costs award (the "Costs Decision").

4. The Town was completely successful and sought costs on a partial indemnity scale of $165,956.75. The Application Judge in her discretion awarded the Town costs of $110,000.00, inclusive of disbursements and HST.

5. There is no basis for this Court to grant leave to intervene or to interfere with the properly exercised discretionary costs award of the Application Judge. The Application Judge made no errors worthy of review.

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[1] Reasons for Decision, para. 86, Moving Parties Motion Record ("MPMR"), p. 49

PART II – STATEMENT OF FACTS

6. The Town accepts the facts in the Moving Parties' factum: 3-8, 11, 12 and 14-22. At para. 18, the Town's actual Reply submissions were half a page.

7. The Town disagrees with the facts in the Moving Parties' factum: 9-10 with respect to outcomes and 13 with respect to the sole issue on appeal.

8. The Town was successful in every respect. The Application was dismissed in its entirety. None of the grounds advanced were accepted by the Court.

Merits Decision, para. 107;
Moving Parties Motion Record ("MPMR"), Tab 2C, p. 52

9. The Town addressed the Rule 57.01 criteria in its Costs Submissions to the Court.

Town Costs Submissions;
MPMR, Tab 2F, pp. 75-82

10. The Moving Parties did not obtain a judgment even as favourable as either the July 17, 2019 confidential offer made only to the Town (the "First Offer") or the September 20, 2019 partial settlement offer (the "Second Offer") (the "Offers").

11. The Moving Parties had full opportunity to address and in fact did address the two settlement offers in their Costs Submissions, which included both Offers.

MP Costs Submissions, paras. 20-23;
MPMR, Tab 2H, pp. 164-165, 226-235

12. The Moving Parties did not raise Rule 49.13 in their Costs Submissions.

13. The First Offer expressly states it is confidential and not to be shared with SORE. It was not referenced in the Town Costs Submissions.

First Offer; MPMR, Tab 2H, p. 230

14. The Town made brief reply submissions after the confidential First Offer was raised by the Moving Parties. These Reply Submissions only addressed the First Offer and were submitted within the Court established time frame for costs submissions.

Town Reply Costs Submissions; MPMR, Tab 2I, pp. 240-241

15. In the First Offer it is clear that it is multi-faceted and the overriding objective of the Moving Parties was to have any remaining disputes consolidated and adjudicated before the Local Planning Appeal Tribunal ("LPAT"). There is no mention in the First Offer about ever appearing before the Conservation Review Board ("CRB").

July 17, 2019 First Offer, MPMR, Tab 2B

16. The statutory amendments under Bill 108 referred to in the First Offer relate to both the *Planning Act* and the OHA. The OHA amendments, which revise the OHA objection process so that a complaint will be heard before LPAT instead of the CRB, are still not in force today. This was the remedy sought.

More Homes, More Choices Act, 2019,S.O, C.9 (Bill 108), s.1 and Sch. 11, s. 26; Schedule B

17. The Second Offer sought to exempt certain heritage attributes from the Moving Parties' challenge while reserving all positions and arguments with respect to the

other attributes. As addressed in the Town Costs Submissions, this did not promise a narrowing of grounds/arguments.

Town Costs Submissions, para. 6; MPMR, Tab 2F, p. 76
Second Offer, para. 1 and 3; MPMR, Tab 2B, pp. 30-34

18. The Impugned Instruments are a Resolution and a By-law giving effect to the Resolution, which authorize issuance of the NOIDs. There is no explanation in the Second Offer as to how a partial challenge would lead to a different remedy.

Affidavit of Kyle Gossen, para. 6, MPMR, Tab 2, p. 16
Second Offer, MPMR, Tab 2B, pp. 30-34

19. The Moving Parties have not brought an Appeal to the Court of Appeal on the sole issue of vagueness of the Impugned Instruments as claimed in para. 13. The appeal also raises two preliminary issues of Jurisdiction and Discretion.

Notice of Appeal, paras. 10-12, MPMR, Tab 2E, pp. 64

PART III – ISSUES - LAW AND ARGUMENT

The Tests for Leave to Appeal and Overturning Costs

20. This is simply not an "obvious case where there are strong grounds upon which the appellate court could find that the judge erred in exercising...discretion." Leave to appeal a costs order must meet this stringent test on any threshold issue.

***Carroll v. McEwen*, 2018 ONCA 902 at paras. 11, 14, 58-59, 80,**
Moving Parties' Costs Book of Authorities ("MP CBOA"), Tab 1

21. A successful litigant has a right to be awarded costs in the discretion of the court.

***Courts of Justice Act*, R.S.O. 1990, c. c.43, s. 131(1); Schedule B**

22. The exercise of discretion is not to be taken lightly by reviewing courts and an appellate court must defer. Her Honour did not consider irrelevant factors, fail to consider relevant factors nor did Her Honour reach an unreasonable conclusion. There was no error in the exercise of discretion by the Application Judge.

> ***Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) at para. 19, MP Costs BOA, Tab 2**

23. A costs award should only be set aside on appeal where the trial judge erred in principle or if the award of costs is plainly wrong.

> ***Carroll v. McEwen*, 2018 ONCA 902 at para. 58, Moving Parties Costs Book of Authorities ("MP Costs BOA"), Tab 1**
>
> ***Birtzu v. McCron*, 2019 ONCA 777 at para. 8, MP CBOA, Tab 4**

24. There is no principled basis upon which this Court could properly interfere with the amount awarded by the Superior Court of Justice. There is also no evidence the award is plainly wrong.

25. This Court should reject the threshold issues raised on the leave motion as there was no discretionary error. This Court should find no error in the Costs Decision.

> ***Carroll v. McEwen*, 2018 ONCA 902 at paras. 11, 14, 58-59 Moving Parties Costs Book of Authorities ("MP Costs BOA"), Tab 1**

ISSUE A: Procedural Fairness and Inadequate Reasons

26. The Moving Parties were not denied procedural fairness because they were not given an opportunity to respond to any reply submissions with a sur-reply.

27. The Moving Parties acknowledge at para. 31 of their factum that they explained their position on the potential impact of acceptance of the two Offers and that both were before the Application Judge. They could have anticipated any issues. Instead they complain their own submissions on the Offers were brief.

Moving Parties Costs Submissions, para. 20-23, Tab 2H, pp. 164-165

28. The Town addressed the Second Offer exclusively in their Costs Submissions. These submissions wholly support the finding of the Application Judge. There is no evidence the findings on the Second Offer relied on any reply submissions.

Town Costs Submissions, para. 6; MPMR, Tab 2F, p. 76

Costs Decision, para. 19; MPMR, Tab 2M, p. 257

29. The Town properly did not initially address the First Offer which clearly stated it was not to be shared with SORE. The Town was not in a position to waive this unilateral condition.

First Offer; MPMR, Tab 2H, p. 230

30. Reply submissions were not precluded in the Merits Decision. Both were submitted within the time frame laid out in that Decision.

Merits Decision, para. 107; MPMR, Tab 2C, p. 52
K. Gossen Affidavit, para. 20; MPMR, Tab 2, p. 19

31. The Moving Parties overemphasize the consequences of their Request to Respond not being addressed at para. 34 where:

a. This Request came after the deadline for costs submissions;

b. The Request raised matters that could have been addressed in the initial costs submissions;

c. It is not necessary for the Application Judge to address every issue or consider all alternatives raised; and

d. The evidence illustrates the Application Judge did understand the matters raised, including in Reply.

32. There was no denial of procedural fairness here and the reasons in the Costs decision are adequate. The Moving Parties were not denied a fair hearing or reasonable opportunity to be heard. "Reasonable" is not unlimited and the Court maintains a wide discretion over process. There is no injustice supporting the setting aside of this Decision.

> 1944949 Ontario Inc. (OMG ON THE PARK), v. 2513000 Ontario Ltd., 2019 ONCA 628 **at para. 27, MP CBOA, Tab 3**

33. None of the cases provided by the Moving Parties support such a finding here:

a. In *OMG*, there was no denial of a fair hearing in refusing an adjournment and the result was mixed on the refusal to admit the respondent's supplementary affidavit. It made no difference to fairness on the merits and caused prejudice only where the costs award relied on unchallenged evidence in the appellant's supplementary affidavit;

b. In *Birtzu,* there had been no consideration whatsoever of settlement offers;

c. In *Melloul-Blamey,* the Trial Judge did not ask for/receive costs submissions and refused costs in the cause on the basis of behaviour "akin to fraud" which was not pleaded or raised. This lack of fairness is distinguishable.

> 1944949 Ontario Inc. (OMG ON THE PARK), v. 2513000 Ontario Ltd., 2019 ONCA 628 **at paras. 27, 35-36, 39 and 42-44, MP CBOA, Tab 3**
> Birtzu v McCron, 2019 ONCA, 777 **at para. 20, MP CBOA, Tab 4**
> Melloul-Blamey Constructions Ltd. v. Schleiss Development Co., 2003 CarswellOnt 4413 (Div. Ct.) **at paras. 8-12, MP CBOA, Tab 5**

34. The Moving Parties make factual errors and misrepresentations in their own Costs Submissions. They assert the First Offer would have led to remaining issues going to the CRB which was clearly not the intent where the First Offer only speaks to a remedy at the LPAT. In respect of the Second Offer, they assert it would have eliminated two of the three issues raised on the Application yet that would not have been the case as all of the issues were reserved in respect of the heritage attributes still subject to challenge. As a result, neither Offer could have led to the resolutions claimed at para. 23 of their Costs Submissions.

Moving Parties Costs Submissions, Paras. 21-23, MPMR, Tab 2H

First Offer, MPMR, Tab 2B

Second Offer, MPMR, Tab 2C

ISSUE B: Quantum of Costs

35. The Moving Parties assert three reasons why the Application Judge erred in the exercise of discretion on quantum which are each addressed below.

(b) The Right of an Intervenor to Costs

36. SORE obtained party status and participated fully throughout. The Town was supported in its response by the factual and legal submissions of SORE.

Merits Decision, Para. 26, MPMR, Tab 2C, p. 40

Costs Decision, para. 15, MPMR, Tab 2M, p. 256

37. The Town leaves the legal response on the intervenor issue to SORE.

(b) The Costs Award to the Town is Not Excessive

38. The Moving Parties are dissatisfied with the costs of this litigation. This is not a justification for overturning this costs award. The Town was completely successful.

Merits Decision, para. 107, MPMR, Tab 2C, p. 52

39. The Town addressed the relevant principles in its Costs Submissions to the Court. The Town sought partial indemnity costs of $165,956.75.

Town Costs Submissions; MPMR, Tab 2F, pp. 75-82

Rule 57.01, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Schedule B

40. The Application Judge awarded the Town costs of $110,000.00, inclusive of disbursement and HST. Her Honour took into account all of the circumstances of the case, considered the relevant factors and exercised her discretion to reduce the requested award of the Town by $55,956.00 or by approximately 1/3.

Costs Decision, para. 26, MPMR, Tab 2M, p. 257

41. The Moving Parties have never produced their own bill of costs, including on this costs appeal where they continue to challenge the quantum as excessive. It is appropriate for the Court to draw an inference from this failure that they must have spent at least the same amount on legal fees. The Application Judge did draw this inference. **Costs Decision, para. 24, MPMR, Tab 2M, p. 257**

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 64 O.R. (3d) 135, [2003] O.J. No. 990 (S.C.J.) at para. 10; Town Book of Authorities, Tab 1

42. The Moving Parties rely on three cases. All three were before the Application Judge. Each case remains unique. Different cost awards do not automatically equate to inconsistency. This is one of several factors to be considered in the exercise of the Court's discretion. The overriding principle remains reasonableness. Even the cases referenced awarded twice, or nearly twice, the costs proposed by the Moving Parties before this Court, illustrating a distorted view of what is reasonable.

> Davies v. the Corporation of the Municipality of Clarington, 2019 ONSC 2292 **at para. 65, MP CBOA, Tab 17**

(c) The Costs Decision and the Settlement Offers

43. There is no requirement to expressly consider Rule 49.13. There is also no evidence the Application Judge failed to take a holistic approach to determining costs under Rule 49 as claimed in para. 53 of the Factum. The Moving Parties did not even expressly request the Application Judge to consider Rule 49.13 in exercising her discretion.

> Konig v. Hobza, 2015 ONCA 885, 2015 CarswellOnt 19169 **at paras. 37-39, MP CBOA, Tab 18**
>
> Davies v. the Corporation of the Municipality of Clarington, 2019 ONSC 2292 **at paras. 68 and 102, MP CBOA, Tab 17**
>
> **Rule 57.01, Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Schedule B**

44. The *Toronto Police* case relied upon by the Moving Parties is not comparable where, as only a Friend of the Court, they were brought a motion to continue the proceedings on issues that were not the subject matter of the application.

> Toronto Police Assn. v. Toronto Police Services Board, [2000] O.J. No. 2236 (Div. Ct.) **at paras. 5 and 10-12, MP CBOA Tab 20.**

45. The Moving Parties also misrepresent the true nature of the First Offer at para. 57 suggesting it would have resulted in the heritage disputes resolved by, "a specialized tribunal in accordance with the *OHA".* As set out in the Town's Reply, this was a complex offer intertwining distinct proceedings. The offer required the Town to withdraw both an injunction application and prosecution. Further, it is oversimplified to suggest this would have achieved the same result where the Offer relied upon new procedures proposed under amended planning and heritage legislation which would have brought the matter before a <u>different</u> adjudicative board, not the CRB, with <u>different</u> decision-making authority. The amendments to the OHA are still not in force.

Moving Parties Costs Submissions, para. 21, MPMR, Tab 2H, p. 165

Town Reply Submissions, MPMR, Tab 2K, p. 241.

46. With respect to the Second Offer, the Moving Parties recognize the clear finding of the Application Judge that Rule 49 had no consequences where it did not 'beat' the ultimate decision of the court. Her Honour referred generally to Rule 49.

Costs Decision, para. 19, MPMR, Tab 2M, p. 257

47. The Moving Parties assert that the failure of the Application Judge to expressly acknowledge Rule 49.13 is a serious error in the exercise of discretion. They show no evidence that Rule must be expressly referred to in every consideration of a settlement offer. This sub-rule says:

> 49.13 Despite Rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

This discretionary power neither requires the Judge to take these additional considerations into account nor to expressly acknowledge whether or not this was the case. It permits the Court to do so despite the more directive parts of Rule 49.

Rules of Civil Procedure, Rule 49, Schedule B

48. The Application Judge did not misunderstand or mischaracterize the Second Offer in "apparent reliance" on the Reply Submissions. First, nowhere is it clear this finding was based only on reply submissions. Second, the Moving Parties' position on the implications of the Offer is inconsistent with its terms. Finally, this issue was directly addressed by the Town in their original Costs Submissions at para. 6:

> "…the offer did not even offer the promise of narrowing the grounds and arguments to be addressed in the application. There would be no reduction in research, preparation or hearing time. Finally, the offer left in serious jeopardy most of the heritage landscape elements which were of critical importance to the Town."

The Court appropriately found that, "Pursuant to Rule 49, this offer has no consequence on any costs order made by the court."

Town Costs Submissions, para. 6; MPMR, Tab 2F, p. 76

Costs Decision, Para. 19, MPMR, Tab 2M, p. 257

If Leave to Appeal is Granted

49. Even if leave to appeal is granted, this Court should conclude on the facts and law presented that the Application Judge did not make an error in principle and the

Costs decision is not plainly wrong. This Court should defer to the discretion of the Application Judge.

Konig v. Hobza, 2015 ONCA 885, 2015 CarswellOnt 19169 **at paras. 44-45, MP CBOA, Tab 18**

Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291 (C.A.) **at paras. 19-20; MP CBOA, Tab 2**

PART V – ORDER SOUGHT

50. The Town seeks an Order:

a. Dismissing the request for leave to appeal the Costs Order;

b. Dismissing the request to set aside or vary the Application Judge's Order on costs against the Town;

c. The costs of this Motion on a partial indemnity basis; and

d. Such further and other relief as counsel may advise and this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2020.

Scott Snider & Nancy Smith

SCHEDULE "A" - LIST OF AUTHORITIES

TAB	DESCRIPTION

LIST OF AUTHORITIES REFERRED TO:	
1.	Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 64 O.R. (3d) 135, [2003] O.J. No. 990 (S.C.J.);

LIST OF AUTHORITIES THE APPELLANTS REFERRED TO:	
2.	Carroll v. McEwen, 2018 ONCA 902:
3.	Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291 (C.A.)
4.	Birtzu v. McCron, 2019 ONCA 777;
5.	1944949 Ontario Inc. (OMG ON THE PARK), v. 2513000 Ontario Ltd., 2019 ONCA 628;
6.	Melloul-Blamey Constructions Ltd. v. Schleiss Development Co., 2003 CarswellOnt 4413;
7.	Davies v. the Corporation of the Municipality of Clarington, 2019 ONSC 2292;
8.	Konig v. Hobza, 2015 ONCA 885, 2015 CarswellOnt 19169;
9.	Toronto Police Assn. v. Toronto Police Services Board, [2000] O.J. No. 2236 (Div. Ct.).

SCHEDULE "B" – LIST OF STATUTES CITED

Courts of Justice Act, R.S.O. 1990, CHAPTER C.43

Costs

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. R.S.O. 1990, c. C.43, s. 131 (1).

Rules of Civil Procedure, R.R.O. 1990, REGULATION 194

RULE 49 OFFER TO SETTLE

DEFINITIONS

49.01 In rules 49.02 to 49.14,

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") R.R.O. 1990, Reg. 194, r. 49.01.

WHERE AVAILABLE

49.02 (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A). R.R.O. 1990, Reg. 194, r. 49.02 (1).

(2) Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications. O. Reg. 627/98, s. 4.

TIME FOR MAKING OFFER

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply. R.R.O. 1990, Reg. 194, r. 49.03.

COSTS CONSEQUENCES OF FAILURE TO ACCEPT

Plaintiff's Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1).

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (2); O. Reg. 284/01, s. 11 (2).

Burden of Proof

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2). O. Reg. 219/91, s. 6.

MULTIPLE DEFENDANTS

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect

of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,

(a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer. R.R.O. 1990, Reg. 194, r. 49.11.

DISCRETION OF COURT

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. R.R.O. 1990, Reg. 194, r. 49.13.

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

More Homes, More Choice Act, 2019, S.O. 2019, c. 9 - Bill 108

Assented to June 6, 2019

Contents of this Act

1 This Act consists of this section, sections 2 and 3 and the Schedules to this Act.

Commencement

2 (1) Subject to subsections (2) and (3), this Act comes into force on the day it receives Royal Assent.

(2) The Schedules to this Act come into force as provided in each Schedule.

(3) If a Schedule to this Act provides that any of its provisions are to come into force on a day to be named by proclamation of the Lieutenant Governor, a proclamation may apply to one or more of those provisions, and proclamations may be issued at different times with respect to any of those provisions.

Short title

3 The short title of this Act is the *More Homes, More Choice Act, 2019*.

SCHEDULE 11
ONTARIO HERITAGE ACT

Commencement

26 This Schedule comes into force on a day to be named by proclamation of the Lieutenant Governor.

TWO SISTERS RESORTS CORP. et al.	**- and -**	**THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE et al.**
Applicants (Moving Parties)		**Respondents (Respondents on Motion)**

Court File No. M51535
Court File No. C68033

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at
ST. CATHARINES

RESPONDING FACTUM OF THE RESPONDENT THE CORPORATION OF THE TOWN OF NIAGARA-ON-THE-LAKE

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