Court File No. M51535
Court File No. C68033

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

Applicants
(Appellants/Moving Parties)

- and -

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

Respondents
(Respondents in Appeal/Responding Parties on Motion)

RESPONDING FACTUM OF SORE ASSOCIATION (MOTION FOR LEAVE TO APPEAL COSTS)

July 13, 2020

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PART I. OVERVIEW

1. This is not one of the rare cases where a costs award warrants appellate review.

2. The respondent SORE was awarded $55,000 after a complex two-day application. The appellants/moving parties, Two Sisters Resorts Corp. and Solmar (Niagara 2) Inc. (the **"Moving Parties"**) still have not disclosed their own costs. They concede on this motion that the amount awarded to SORE is actually less than a typical costs award in the circumstances, instead focusing on the fact that SORE was added as a party on a motion.

3. SORE was a full party respondent to this application. It intervened as an added party under Rule 13.01, not as a friend of the Court under Rule 13.02. There were no restrictions on SORE's participation in the proceeding or on its liability for costs. Consistent with its unrestricted status, SORE led expert evidence, cross-examined each of the Moving Parties' three witnesses, and made legal submissions. The Moving Parties have already sought and obtained a costs award against SORE on an interim motion in the application.

4. The Moving Parties' claim of procedural unfairness also lacks merit. The *Rules of Civil Procedure* require judges to "devise and adopt the simplest, least expensive and most expeditious process for fixing costs." Contrary to that directive, the Moving Parties sought to make sur-reply submissions, three full days after the deadline for costs submissions had expired. They have not explained that delay, and their proposed sur-reply submissions were repetitive and unfounded in any event.

5. This motion should be dismissed with costs.

PART II. ADDITIONAL FACTS

6. SORE sets out the following additional facts which are omitted from the Moving Parties' factum.

A. SORE was added as a full party

7. SORE brought a motion to be added as a party respondent to this application under Rule 13.01 of the *Rules of Civil Procedure*. The motion was heard in April, 2019. The Town consented and the Moving Parties opposed.

8. Justice Donohue granted SORE's motion and added SORE to the application as a full party respondent. The formal order was clear that SORE was being added as a party, and not as a friend of the Court under Rule 13.02: "This Court grants leave to SORE to intervene in this proceeding as an added party." The order also amended the title of proceeding to reflect SORE's status as a "Respondent."

9. The order set no other terms on SORE's involvement as a party to the proceeding, including any limitations on SORE's liability for costs of the application. The Moving Parties chose not to seek any such restrictions in their argument on the motion. Instead, their factum in response to the motion expressly relied on the prospect of the "additional costs" which would arise because SORE, "as an added party, would participate in setting the record." Presumably, the Moving Parties would have looked to SORE for their costs had they been successful on the merits of the application.

> Moving Parties' Motion Factum, paras. 68-69, SORE Responding Motion Record ("RMR"), Tab 3.

B. SORE has already paid a costs award in this proceeding

10. In fact, the Moving Parties have already sought and obtained costs from SORE during this proceeding. The Moving Parties' summary of the facts omits mention of the

refusals motion brought by the Moving Parties after cross-examination of SORE's expert witness, Michael McClelland.

11. SORE unsuccessfully opposed the motion, and was ordered by Henderson J. to pay costs to the Moving Parties of $8,500, which SORE paid promptly.

C. The process for setting costs

12. The Moving Parties' description of the process which gave rise to the Costs Award is incomplete.

13. Justice Walters' Reasons for Decision on the merits of the application provided only for any costs submissions to be made within 30 days, with no specific reference to the order of submissions or any provision for reply or sur-reply.

14. Consistent with that direction, both SORE and the Town made their reply submissions on February 10, 2020, the final day of the 30-day period for making costs submissions. SORE's reply was delivered within hours of receiving the Moving Parties' responding costs submissions earlier in the day on February 10, 2020.

15. SORE's reply addressed only two issues: (1) the Moving Parties' reliance on a confidential offer to settle which had been made only to the Town, not SORE; and (2) the Moving Parties' incorrect description of the terms of their second offer to settle.

16. The Moving Parties' letter requesting sur-reply came late. It was delivered on February 13, 2020, three full days after the expiry of the deadline for costs submissions.

17. Unlike SORE's reply submissions, which were filed via email and in hard copy, the Moving Parties' request was made via email only and was never properly filed with the Court in hard copy through the ordinary channels. The Moving Parties' request

summarized each ground of sur-reply submissions they were proposing to make.

18. Having not received an immediate response to their email request for a sur-reply, the Moving Parties still did not file any materials at the courthouse or take any other diligent follow-up steps.

19. Instead, the only step the Moving Parties ever took to follow up on their February 13, 2020 letter requesting the right to make sur-reply was a single email almost a month later, on March 6, 2020, from counsel's assistant to Tony Leonardo, apparently another court employee who had not been involved in the costs process to date.

Affidavit of Kyle Gossen, para. 22, Moving Parties' Motion Record tab 2.

20. This email, which did not copy any other party to the proceeding, was vague and contained no context or any explanation of why the Moving Parties were forwarding the document. The entirety of this email read as follows: "Hi Tony – Sara has asked me to forward this document to you. Thanks very much." The document being forwarded was the February 13, 2020 letter requesting sur-reply.

Email from Bev Jong to Tony Leonardo, March 6, 2020, Exhibit L to the Affidavit of Kyle Gosson, Motion Record tab 2L.

PART III. LAW & ARGUMENT

A. Leave to appeal costs awards is rare

21. The Moving Parties correctly note that leave to appeal a costs order is granted by this Court "only in obvious cases where there are strong grounds upon which the appellate court could find that the judge erred in exercising [her] discretion."

Moving Parties' factum, para. 26, citing *Carroll v. McEwen*, 2018 ONCA 902 at para. 58.

22. This Court has repeatedly stated that leave will be granted only sparingly, in the rare case where there is a serious error in the costs award at issue.

> See e.g. *Carroll v. McEwen*, *ibid*. at para. 58; *Parent v. Janandee Management Inc.*, 2017 ONCA 922 at para. 32 ("The suggested errors do not rise to the level of seriousness that is required to satisfy the rare instance where leave to appeal a costs award will be granted").

23. This test is not met.

B. No procedural unfairness

24. There was no procedural unfairness in the Application Judge's decision not to entertain the Moving Parties' proposed sur-reply costs submissions after the deadline.

25. The Moving Parties' allegation of procedural unfairness must be evaluated in the context of the legislative scheme. Under the *Rules of Civil Procedure* (the **"*Rules*"**), the fixing of costs is always a summary process; the *Rules* expressly require the Court to "devise and adopt the simplest, least expensive and most expeditious process for fixing costs". There is no right to make sur-reply submissions on costs, and there is no right to make written submissions on costs at all.

> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 57.01(7). See also *Zheng v. G4S Secure Solutions (Canada) Ltd.*, 2020 ONSC 498 at para. 53 (upholding a Master's decision to fix costs without written submissions).

26. In this context, the application judge committed no error in refusing to entertain sur-reply after the deadline for making submissions, let alone an error rising to the exceptional level necessary to warrant leave to appeal.

27. Sur-reply costs submissions are rare and are not to be encouraged. The Moving Parties delivered their submissions on the matter on the last day of the deadline, and they knew or ought to have known that those submissions might prompt a reply, given their reliance for the first time on a confidential offer to settle which had been made only to the Town and not to SORE.

28. In this context, the Moving Parties could not reasonably have been relying on the

ability to make a further sur-reply and in any event their sur-reply arguments had already been summarized in their February 13, 2020 letter.

C. The sur-reply was repetitive in any event

29. Further, there was no merit to the proposed sur-reply had it been allowed. Most of it was a re-argument of the Moving Parties' initial costs submissions. Each of the three grounds of proposed sur-reply to SORE's reply could not possibly have affected the result.

30. The first ground of proposed sur-reply was that "SORE is incorrect that the proceeding 'could not have ended without the consent of all parties'". The Moving Parties already addressed this point in their initial submissions: they submitted that its confidential offer to the Town "would have ended this proceeding". There was no basis for sur-reply. Moreover, the Moving Parties were wrong. It was plainly irrelevant to costs that they had made a confidential offer to only one of the two respondents.

31. The second ground of proposed sur-reply was that "SORE has misunderstood and therefore mischaracterized the September 2019 offer". This was also incorrect. In any event the Moving Parties' submissions in this Court are repetitive of their initial costs submissions in the Court below, demonstrating that no useful purpose would have been served by granting a sur-reply.

32. The issue regarding the September 2019 offer was whether it would have narrowed the legal issues to be adjudicated in the application. The Moving Parties' initial costs submissions claimed that their offer would have "eliminated two of the three issues raised on the application, significantly narrowing its scope".

> Moving Parties' responding costs submissions, para. 22, Exhibit H to the Gossen Affidavit, Motion Record tab 2H, p. 165.

33. This is also incorrect. In reply, SORE observed that while the September 2019 offer would have withdrawn the challenge to certain heritage attributes listed in the Impugned Instruments, it was still an express term of that offer that "acceptance of this Offer is without prejudice to the [Moving Parties'] position and arguments with respect to those Key Heritage Attributes which are not Accepted Attributes".

> Partial Offer to Settle, para. 3, Motion Record tab 2B, p. 32.

34. Ignoring this stipulation, the Moving Parties submit on this motion – as they proposed to submit in sur-reply in the Court below – that had their offer been accepted, "the other two issues regarding the illegality of the Impugned Instruments […] would not have been contested."

35. The Moving Parties still have not explained how this could be true, given their own offer's express caveat that it was "without prejudice to [their] position and arguments" with respect to the remaining heritage attributes. Instead, their submissions on this motion are repetitive of the costs submissions already made to the application judge, thus demonstrating that no sur-reply was warranted.

36. The third issue on which the Moving Parties proposed to make sur-reply was that "SORE is incorrect that 'neither of the [Moving Parties'] two offers is relevant to costs".

37. This was precisely the issue the Moving Parties had already addressed fully in their initial responding submissions, and they identified nothing new in SORE's reply that warranted sur-reply. The Moving Parties were also wrong on the merits, as addressed above.

D. SORE was entitled to costs as a full party respondent

38. The Moving Parties' second proposed ground for leave to appeal the Costs Award is that the application judge "erred seriously in exercising discretion" to award costs to SORE, on the basis that SORE was an "intervenor". The Moving Parties describe this award as "unprecedented."

39. SORE was not an "intervenor" in the sense described by the Moving Parties, and there is nothing "unprecedented" about this award of costs.

40. The *Rules* provide for two forms of involvement by "intervenors":

> **LEAVE TO INTERVENE AS ADDED PARTY**
>
> 13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> **LEAVE TO INTERVENE AS FRIEND OF THE COURT**
>
> 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Rules, r. 13.01, 13.02.

41. SORE was added as a full party respondent under Rule 13.01. It was not an "intervenor" in the ordinary sense. The title of proceedings was amended to reflect SORE's status as a respondent. SORE tendered expert evidence, cross-examined all of the Moving Parties' witnesses, and made detailed legal submissions which were substantially accepted by the application judge.

> See e.g. Reasons for Decision at para. 48, Motion Record tab 2C ("I agree with Mr. Stephenson's submissions that there is good policy reason why the court should not intervene at this juncture …").

42. Moreover, the order adding SORE to the application contained no restrictions on its participation in the matter or on its potential liability for costs, nor did the Moving Parties request any such restrictions at the hearing of the motion.

43. As such, SORE was at risk of an adverse costs award in the same manner as any other party. That risk was not hypothetical: as noted above, the Moving Parties in fact sought costs against SORE on an interim motion, and collected an $8,500 award.

44. Having already sought and obtained costs against SORE, the Moving Parties now effectively argue that the costs risk should not have been mutual.

45. The application judge considered and rejected this argument in her Costs Award. She relied on *North American Financial Group Inc. v. Ontario Securities Commission*, a 2018 Divisional Court decision. That decision held as follows:

> The Intervenors were granted leave to intervene as parties to the appeal pursuant to Rules 13.01 and 13.03 of the Rules of Civil Procedure, not as friends of the court, pursuant to Rule 13.02. This is a critical distinction on the question of their entitlement to costs. […] In my view participation as a party necessarily includes the right to seek costs or to have costs awarded against the Intervenor unless the order granting leave to intervene states otherwise.
>
> 2018 ONSC 1282 at para. 13 (Div. Ct.)

46. The application judge was therefore correct to hold that as a full party, SORE was entitled to costs. The Moving Parties' submissions on this motion:

(a) do not offer any reason to doubt the correctness of the *North American Financial Group* decision;

(b) do not address that decision in any way; and

(c) do not otherwise address the "critical distinction" between being added as a friend of the Court under Rule 13.01 versus being added as a party under

Rule 13.02 of the *Rules*.

E. The quantum of costs awarded

47. There was nothing "unprecedented" about the quantum of costs awarded to SORE. An award of $55,000 for a complex two-day application, in circumstances where SORE sought over $150,000 in costs, is well within the range of reasonableness.

48. Notably, the Moving Parties still have never disclosed their own costs. They should not be heard to challenge the quantum awarded to the successful parties.

49. In any event, the quantum awarded is unremarkable. This case was complex factually and legally. Factually, the Moving Parties tendered three expert opinions from two expert witnesses, and extensive fact evidence. Each of their affiants was cross-examined. Legally, it was undisputed that this case was the first time anyone had ever sought to quash a preliminary Notice of Intention to Designate under the *Ontario Heritage Act*. This novelty necessitated significant legal research, including regarding prematurity in this particular statutory context. The application judge accepted SORE's position in this regard and dismissed the application on the basis of prematurity.

50. The Moving Parties acknowledge that the typical range of costs award in matters of similar complexity is $60,000 to $80,000. That concession should dispose of any challenge to the quantum of costs awarded to SORE.

Moving Parties' Factum, para. 49.

51. Even taking into account that SORE was an added party, there is still ample precedent for a costs award of this nature:

(a) In *Mayerovitch v. Breslin*, the intervenors were awarded costs of $113,045.08 (on a substantial indemnity scale);

(b) In *Nolar Industries Ltd. v. Freight Transportation Assn.*, a 2006 decision, the intervenor was awarded costs of $42,498.80, which is comparable to SORE's $55,000 award in 2020 dollars; and

(c) In *North American Financial Group Inc. v. Ontario Securities Commission*, an added party intervenor was awarded costs of $20,000 for an appeal in which their participation was limited to certain issues only.

Mayerovitch v. Breslin, 2013 ONSC 1772 at para. 21; *Nolar Industries v. Freight Transportation Assn.*, 2006 CarswellOnt 3242 at para. 13 (S.C.J.); *North American Financial Group Inc. v. Ontario Securities Commission*, 2018 ONSC 1282 at para. 22.

52. The application judge's award is amply supportable by the authorities. There is no basis to grant leave to appeal to review this exercise of discretion.

PART IV. RELIEF REQUESTED

53. SORE requests an order dismissing this motion with costs.

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

Chris Paliare
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Lawyers for the Respondent, SORE Association

SCHEDULE A
LIST OF AUTHORITIES

1. *Carroll v. McEwen*, 2018 ONCA 902

2. *Parent v. Janandee Management Inc.*, 2017 ONCA 922

3. *Zheng v. G4S Secure Solutions (Canada) Ltd.*, 2020 ONSC 498

4. *North American Financial Group Inc. v. Ontario Securities Commission*, 2018 ONSC 1282 (Div. Ct.)

5. *Mayerovitch v. Breslin*, 2013 ONSC 1772

6. *Nolar Industries v. Freight Transportation Assn.*, 2006 CarswellOnt 3242 (S.C.J.)

SCHEDULE B
LIST OF STATUTORY AUTHORITIES

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

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[…]

Process for Fixing Costs

57.01 (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.

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

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RESPONDING FACTUM OF THE RESPONDENT, SORE ASSOCIATION (MOTION FOR LEAVE TO APPEAL COSTS)

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