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# Peel Condominium Corporation No. 449 v. Owen, 2005 CanLII 34821 (ON S.C.)

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Date: 2005-09-19

Docket: CV-04-010287-00

**COURT FILE NO.:** CV-04-010287-00

**DATE:** 20050919

## SUPERIOR COURT OF JUSTICE - ONTARIO

**RE:** Peel Condominium Corporation No. 449 v. Robert Owen, Chairman of the Group of 5

**BEFORE:** Tulloch J.

**COUNSEL:** Jonathan H. Fine, for the Applicant

Robert Owen, for the Respondent

### ENDORSEMENT RE COSTS

[1] This costs order follows my endorsement on an application for an injunction restraining the respondents from holding a meeting of the owners of the applicant condominium corporation. The applicant was substantially successful in their application and submit that costs should follow the event and be awarded on a substantial indemnity basis based on an itemized bill of costs. The applicant submits that a cost order should be awarded totaling \$21,597.64, as well as an order that such costs be added to the common expense contributions in respect of the respondent's unit.

[2] The respondent, in contrast, submits that he is entitled to costs totaling \$3,784.06, and also on a substantial indemnity basis. As well, the respondent argues that special circumstances exists which

justifies the court in exercising its discretion to withhold costs to the successful party or in the alternative, award costs against the successful party pursuant to Rule 57.01(2) of the *Rules of Civil Procedure*.

[3] Pursuant to section 131(1) of the *Courts of Justice Act*, the award of costs is completely within the discretion of the court. The *Act* states that the court may determine by whom and to what extent the costs shall be paid. In exercising its discretion, the court may consider a number of factors including the result in the proceedings, any offer to settle made in writing and the importance of the issues: Rule 57.01(4). Each case must be determined by its own facts in determining quantum and fixing costs. The objective is to fix an amount that is fair and reasonable in the particular circumstances of the case.

[4] The general rule is that costs should follow the event and should be fixed. The circumstances in this case are not so exceptional to justify the court in not adhering to the general rule. I am also not satisfied that costs should be withheld from the successful party in this case. Nor am I satisfied that there exist any legal justification in this case to award costs to the unsuccessful party. The applicant corporation was successful in their application and so costs will be awarded to the applicant. The respondent was unsuccessful and is not entitled to any costs. As such, there will be an award of costs as against Mr. Owen. I am not satisfied however, that Mr. Owen or the Group of 5 was so egregious in their conduct as to warrant an award of costs on a punitive scale. In the circumstances, costs are awarded on a partial indemnity basis, and will follow the event. I am also not persuaded that such costs order should be added to the common expense contributions with respect to the respondent's unit.

[5] The costs award should reflect more what the court views as a fair and reasonable amount to be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant: *Zesta Engineering Ltd. v. Cloutier* 2002 CanLII 25577 (ON C.A.), (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4.

[6] In determining the appropriate quantum to be fixed in the case at bar, I have considered the particular facts as well as attempts on both sides to settle the matter.

[7] Pursuant to Rule 57.01(c) and (e) of the *Rules of Civil Procedure*, I have considered the nature and complexity of the action in determining the appropriate costs assessment. This case was an injunction for a restraining order to restrain the respondents from holding a meeting of the owners of the applicant condominium corporation. The application was not very complex or the issues overly difficult.

[8] Counsel for the applicant is a senior counsel with twenty-eight years experience. He billed his rate at \$450.00 per hour, and submits that he spent a total of 41 hours on the matter. He also accounted for the time of a junior solicitor, Mr. Michael Pascu, who was called to the Bar in 1998 and now has six years experience. Mr. Pascu's rates are billed at \$225.00 per hour and he spent a total of 1.4 hours on the file. The application lasted one full day of hearing. The total amount of fees billed is \$19,025.00 plus disbursements and GST, totaling \$21,597.64. I note the rate billed by counsel is the maximum rate suggested under the costs grid for senior counsel.

[9] There must be practical and reasonable limits to the amounts awarded for costs and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated. I note that it is not necessary for me to have to go through the hours, line by line, in order to determine what are the appropriate costs. Nor is the court to second-guess the amount of time claimed unless it is clearly excessive or overreaching. The courts have determined that trial judges should consider what is reasonable in the circumstances, and after taking account of all the relevant factors, courts should award costs in a more global fashion. If the hours in the Bill of Costs appear to be excessive, the trial judge may reduce the hours to what is reasonable. There are a number of recent

cases which outline this principle: *Tantalo v. Carbone*, [1995] O.J. No. 3506 (Gen. Div.) (Q.L.); *Eagleson v. Dowbiggan*, [1996] O.J. No. 2177 (Gen. Div.) (Q.L.), aff'd [1988] O.J. No. 3919 (C.A.) (Q.L.); *835039 Ontario Inc. v. Fram Development Corp.*, [1994] O.J. No. 2937.

[10] It is also clear from the case law in this area of the law that maximum rates will only be ordered in maximum cases. The words "up to" suggest that in most cases, lower rates than those listed will be awarded. I take into account the experience of counsel, the complexity of the issues and the nature of the action in determining whether this is a maximum case. I do agree that counsel for the applicant is an experienced counsel, but the experience of counsel is only one of the factors that must be considered. In *Glazman v. Toronto (City)*, [2002] O.J. No. 2767 (S.C.J.) (Q.L.), the court lists several factors judges should consider when they exercise their discretion in awarding costs, including the claim, offer, apportionment of liability, complexity, importance of the issues, conduct, improper or unnecessary steps, stubborn refusal to admit and any other matter that is relevant to costs. The court notes the phrase "up to" indicates that the figures in the costs grid are meant to be maximum rates. It is a common sense rule that maximum awards are for maximum cases. The experience of counsel is only one factor involved in fixing the rate.

[11] In applying the principles as set out above to the case at Bar, given the fact this application was for an injunction to restrain the respondent from holding a meeting, I find that this was not a complex matter requiring the maximum rates.

[12] Based on my findings with respect to the complexity of the case, I find the hourly rates charged to be excessive in the circumstances. In this case, I feel it appropriate to set senior counsel's rate at \$400.00 per hour based on a substantial indemnity basis. I have no difficulty with junior counsel's rate at \$250.00 per hour. I adopt Justice Lang's observations in *3664902 Canada Inc. v. Hudson's Bay Co. (c.o.b. Bay Department Stores)*, [2002] O.J. No. 2096 (Ont. Sup. Ct.) at paragraph 8, where she noted that under the costs grid, the hourly rates allowed on a partial indemnity basis are approximately 75% of those allowed on a substantial indemnity basis. Accordingly, the rates claimed by the applicants should be valued as follows:

Mr. Jonathan Fine:                   \$300.00

Mr. Michael Pascu:                   \$187.50

[13] Based on the urgency and nature of the application, I find the amount of hours claimed for preparation to be reasonable. Accordingly, the applicant's claim for costs is fixed at \$13,696.00 inclusive of GST.

### **Disbursements**

[14] I have reviewed the disbursements claimed by the applicant. The disbursements claimed must also be reasonable and are subject to the court's discretion. I find the disbursements claimed to be reasonable in the circumstances. Accordingly, the total disbursements of \$1,012.98 plus the GST of \$157.00 will also be included in the total costs award. Thus, the total costs awarded to the applicant is \$14,865.98.

### **Re: December 15, 2004 Attendance**

[15] I have reviewed the materials filed and I am of the view that costs should be fixed in the amount of \$750.00 inclusive of GST, and payable by the respondent to the applicant forthwith.

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Tulloch J.

**DATE:** September 19, 2005

**COURT FILE NO.:** CV-04-010287-00

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**RE:** Peel Condominium  
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**BEFORE:** Tulloch J.

**COUNSEL:** Jonathan H. Fine,  
for the Applicant

Robert Owen,  
for the Respondent

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**ENDORSEMENT re COSTS**

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Tulloch J.

**DATE:** September 19, 2005

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