

Civil Litigation

Cost awards from Ontario Land Tribunal, part one

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(April 18, 2023, 12:46 PM EDT) -- Costs in our civil litigation courts are the norm. In general, the winner gets a costs award, and the loser pays. Things are different at the Ontario Land Tribunal (OLT). The rules of our civil courts do not apply. Costs orders are rare. They are only awarded in narrow circumstances.

This article (part one of a three-part series) will examine the recent origins of the OLT and the tribunal's criteria for a costs award under the *Ontario Land Tribunal Act, 2021*, the *Statutory Powers Procedure Act (SPPA)* and the OLT's *Rules of Practice and Procedure*.

The Ontario Land Tribunal is born

At the height of the COVID-19 pandemic, Ontario courts and tribunals became highly backlogged. Delays mounted as the bench and the bar were engaged in the foundational change of moving matters over to the virtual world.



Bree Pierce

A resolution came in part through the *Accelerating Access to Justice Act, 2021*, which received royal assent on April 19, 2021. Spurred in part by the lengthy delays, the Act had as its goal to promote access to justice through modernization and barrier reduction in Ontario's tribunals, *inter alia*.

The *Accelerating Access to Justice Act, 2021* introduced several changes. One of the most notable was the creation of the OLT via Schedule 6 of the Act: the *Ontario Land Tribunal Act, 2021*.

The OLT came into being on June 1, 2021. Section 2 of the *Ontario Land Tribunal Act, 2021* defined the new tribunal as the amalgamation of six adjudicative bodies: the board of negotiation under the *Expropriations Act*, the Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal. This motley creation that is the OLT hears matters relating to:

- land use planning;
- environmental and natural features and heritage protection;
- land valuation;
- land compensation;
- municipal finance;
- any related matters.

The OLT has the power to create rules to govern its practice and procedures, to which the SPPA is subordinated.

Vested with this power, the OLT created its own *Rules of Practice and Procedure*. The most recent version came into force as of June 1, 2021.

The OLT Rules set out the costs provisions. Like the SPPA, the OLT Rules only allow for costs to be awarded where a party's course of conduct has been "unreasonable, frivolous or vexatious or a party has acted in bad faith." While the Rules do list some circumstances that might give rise to a costs order, the list is neither exhaustive nor precise.

In part one of this three-part series, we will examine the legislation that grants the OLT jurisdiction to order costs. In part two, we will look at recent case law that considers the criteria on which a tribunal will order costs. Finally, in part three, we will examine the scope and scale of costs that the OLT can award.

The tribunal's costs jurisdiction: SPPA and OLT Rules

The OLT's jurisdiction to order costs is statutory (*Davidson v. McKellar (Township)*, 2022, LNONLT 152).

There are two parts to the statutory jurisdiction: Section 17.1 of the *Statutory Powers Procedure Act*, and the OLT's *Rules of Practice and Procedure*.

SPPA, section 17.1

Subsection 17.1(4) of the SPPA stipulates when the tribunal can exercise its costs jurisdiction:

- (4) A tribunal may make rules with respect to,
- (a) the ordering of costs;
 - (b) the circumstances in which costs may be ordered; and
 - (c) the amount of costs or the manner in which the amount of costs is to be determined.
- [...]

OLT Rule 23

Subsection 13(1) of the *Ontario Land Tribunal Act, 2021* authorizes the tribunal to make rules governing its practices and procedures. This authority has resulted in the OLT's *Rules of Practice and Procedure*. Rule 23 addresses costs generally. Rule 23.9 addresses the circumstances for costs orders specifically and non-exhaustively:

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.

The Tribunal is not bound to order costs when any of these examples occur as the Tribunal will consider the seriousness of the misconduct.

Rule 23.10 grants discretionary costs powers to the tribunal:

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 the proceeding and direct payment be made by a certain date by order. [...]

Section 20 of the *Ontario Land Tribunal Act, 2021* enables the tribunal to apply Rule 23:

20 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.

Tribunal's costs jurisdiction: General principles

As noted, the civil courts' principle that costs follow the cause has no equivalent before the OLT. Costs awards are rare. When they are made, they are not meant to indemnify a successful party. They are meant to penalize improper conduct.

In *2684360 Ontario Ltd. v. Kingston (City)*, 2021 LNONLPAT 143, vice-chair David Lanthier summarized the principles underlying the OLT's costs jurisdiction:

[...] 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 no total immunity from cost claims. [...]

We will next examine OLT Rule 23.9 and criteria for applying these principles.

Rule 23.9: Criteria for costs

Under both OLT Rule 23.9 and SPPA ss. 17.1(2)(a), the tribunal only has the jurisdiction to make a costs order if a party's conduct falls into one of these four categories:

1. unreasonable,
2. frivolous,
3. vexatious,
4. in bad faith.

Rule 23.9 sets out nine examples of such conduct. The list is non-exhaustive and non-binding on the tribunal. Nor is the tribunal bound to order costs where any of the nine examples do obtain.

The first question we must address is how the OLT has defined the four categories of conduct that enable it to make costs orders. We continue the analysis in part two of this series.

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