

Civil Litigation

Cost awards from Ontario Land Tribunal, part three

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(April 25, 2023, 11:08 AM EDT) -- In the first part of this series, we looked at the jurisdiction of the Ontario Land Tribunal (OLT) to award costs. In the second, we looked at the kinds of conduct that attract costs awards. In this final part, we look at the scope and scale of costs that can be awarded if a costs award is merited.

General principles in awarding costs

In a recent decision of the OLT (*Davidson v. McKellar (Township)*, 2022 LNONLT 152 at para. 16), vice-chair David Lanthier set out 12 principles governing Rule 23 costs requests, of which these are the key excerpted portions:

- Costs do not follow the cause, and costs are not awarded simply because the party filed an appeal that was unsuccessful.
- 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.
- The tribunal is never obligated to make an award of costs if the conduct falls within the examples provided in Rule 23.9, and it will exercise its discretion upon the whole of the information placed before it.
- The approach of the tribunal is to ensure that litigants are not dissuaded from exercising their right of appeal for fear of costs, especially where an appeal gives rises to matters of broader public interest.
- Despite the exceptional nature of a costs award, parties must also be held accountable for their conduct that is clearly unreasonable, frivolous, vexatious or in bad faith that it is deserving of an order compensating a party impacted by such conduct.
- It is the conduct as a whole that must be the relevant focus of the tribunal. Conduct within the parameters set out in Rule 23.9 must be demonstrated.
- An objective test must be applied when examining the conduct of the responding party to a motion for costs which is essentially a “reasonable person” test.
- S. 20 of the *Ontario Land Tribunal Act* makes clear that the costs to be considered are the costs “... of, and incidental to any proceeding” and are payable by a party to the proceeding. “Proceeding” is defined in the tribunal’s *Rules of Practice* as any matter, procedure, appeal referral or application before the tribunal and includes matters which may be initiated by the tribunal.

Scope of costs orders the tribunal may make

The question arises of how broad a request for costs from the tribunal can be. The *Ontario Land Tribunal Act* and the Rules appear to grant the tribunal a more extensive costs jurisdiction, not limited to the hearing alone.

Not limited to hearing

Section 20 of the *Ontario Land Tribunal Act* says:

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.

[Emphasis added.]

Similarly, OLT Rule 23.10 says:

23.10 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.

[Emphasis added.]

Parsing the plain meaning of these two provisions, the tribunal may:

(a) fix the costs of the proceeding, *and*

(b) fix the costs *incidental* to the proceeding.

The next issue, then, is what “incidental to” means.

The meaning of ‘incidental to’

The prevalent, and most reasonable, interpretation of “incidental to” in the statute and the rule is a broad one: costs extending beyond the hearing itself, but not beyond the proceeding.

The broader approach is also consistent with decisions from OLT’s predecessors and the courts, for example:

- a tribunal could order costs for unreasonable conduct beyond the proceeding itself, including conduct relating to the subject matter of the proceeding (*CNH Canada Ltd v. Chesterman Farm Equipment Ltd*, 2018 ONCA 637);
- punitive costs can be ordered on a party who asked for and received a last-minute adjournment that caused inconvenience.

There are, however, limits to these “incidental” occurrences:

- “incidental to” costs powers did not extend to meetings, discussions and exchanges between the parties after a tribunal makes an order, but before a motion to the tribunal resulting from the parties’ dispute over the interpretation of an order: while the parties’ dispute was *related* to the proceeding, “it [was] not incidental to the proceeding itself”;
- pre-litigation costs for counsels’ preparation in the months leading up to an application that they expected was going to be issued, but had not yet been issued, were not “incidental to the proceeding” (*Greenlight Capital, Inc v. Stronach*, 91 OR (3d) 241 at para. 77).

These cases suggest that, as long as a step is tied to and within the proceeding, it is *incidental* to the proceeding. If, however, the step lies outside the proceeding, even if it is related, it is not incidental.

Scale of costs

Where the tribunal does award costs, it will be reluctant to order them on more than a partial indemnity scale, unless it finds that the unreasonable, frivolous, vexatious or bad faith conduct was egregious. According to vice-chair Lanthier (*2684360 Ontario Ltd. v. Kingston (City)*, 2021 LNONLPAT

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... high-range orders of costs are reserved only for the most egregious conduct that is “reprehensible, scandalous or outrageous” and is beyond “merely” unreasonable, vexatious or bad faith conduct.

Conclusion

As we said in the first of this article’s three parts, costs principles and practices at the Ontario Land Tribunal differ from those in our civil litigation courts. The civil courts’ rules do not apply at the OLT. Costs orders from the OLT are rare and awarded only in narrow circumstances.

In this three-part series we have attempted to examine the what, how, why and when of OLT costs awards, and the criteria for them under the *Ontario Land Tribunal Act, 2021*. Read the first article: Cost awards from Ontario Land Tribunal, part one; the second article: Cost awards from Ontario Land Tribunal, part two.

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