

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Two Sisters Resorts Corp. and Solmar)	M. Melling and S. Premi, for the Applicants
(Niagara 2) Inc.)	
)	
Applicants)	
)	
- and -)	
)	
The Corporation of the Town of Niagara-)	S. Snider, N. Smith and B. Harasym, for The
on-the-Lake and SORE Association)	Corporation of the Town of Niagara-on-the-
)	Lake
Respondents)	
)	C. Paliare, R. Stephenson and H.A.P. Little,
)	Counsel for SORE Association
)	
)	
)	
)	HEARD: By written submissions
)	

THE HONOURABLE JUSTICE L. WALTERS

COST ENDORSEMENT

- [1] On January 10, 2020, the court dismissed Two Sisters Resorts Corp. and Solmar (Niagara 2) Inc.'s application in its entirety.
- [2] The parties were invited to provide the court with their written submissions within 30 days of my decision.
- [3] I have now had the opportunity to review these submissions, including letters containing reply submissions from the Town of Niagara-on-the-Lake and SORE Association.
- [4] This was a two-day application wherein Two Sisters challenged the Town's resolution and by-law directing the issuance of certain noids. The applicants alleged the Town acted illegally.
- [5] The court determined any such application was premature until its rights under the

Ontario Heritage Act were exhausted. The court also found no illegality on the part of the Town.

- [6] The Town seeks partial indemnity costs in the amount of \$165,956.75, including disbursements of \$23,296.
- [7] SORE seeks partial indemnity costs of \$152,042.83, including disbursements of \$6,476.23.
- [8] The applicants argue that this is not a case for costs. The applicants served two offers to settle (July 17, 2019 and September 20, 2019). There were no offers from the respondents. If either offer had been accepted, the issues would have been narrowed and costs significantly reduced.
- [9] Moreover, the costs claimed by the respondents are excessive and not reasonable. SORE, as an intervenor is not entitled to costs. In the alternative, any award should be modest at best.
- [10] Always when fixing costs, the court must award an amount that is fair and reasonable for the losing party to pay.
- [11] Rule 57.01 of the *Rules of Civil Procedure*, set out the factors the court is to consider in fixing costs.
- [12] First, the respondents were entirely successful and the general rule is that costs follow the event.
- [13] In my view, there is nothing in this case which requires a departure from this principle.
- [14] However, I will address certain concerns raised by the applicants.
- [15] Is SORE entitled to costs? When added as a party to the proceedings by Donahue J. on April 4, 2019, there were no restrictions made to their participation or entitlement to costs. In fact, they participated fully in the action to date. This case is similar to that in *North America Financial Group Inc. v. Ontario Securities Commission* 2018 ONSC 1282 (Div Ct).
- [16] In my view, SORE was completely successful on this application, and is entitled to some costs. The question of quantum will be discussed later in these reasons.
- [17] The second issue raised by the applicants is whether or not these offers of July 17th or September 20th should affect the awarding of costs to the respondents.
- [18] With respect to the offer of July 17th, it was never sent to SORE. The Town was specifically asked not to share it with SORE and keep it confidential. In these circumstances it is impossible to see how this offer could have resolved all issues, if one party is excluded.

- [19] The applicants' second offer did not "beat" the ultimate decision of the court. The applicants were not successful. Pursuant to Rule 49, this offer has no consequences on any cost order made by the court.
- [20] The real issue, and the one with some merit, is the actual bill of costs submitted by the Town and Sore. I agree with the applicants, that despite this being a very important and somewhat complex matter, the number of lawyers involved and hours billed is excessive in all the circumstances.
- [21] The Town is seeking in excess of 422 hours on this two-day application. SORE is claiming 340.5 hours. Each respondent retained very experienced and knowledgeable lawyers to represent them. However, it was not necessary for these experienced counsels to require multiple other lawyers to attend with them at cross-examinations and argument of this application. Parties are free to retain and pay as many lawyers as they wish, however, they cannot expect an unsuccessful litigant to pay for them.
- [22] This is particularly true of SORE. SORE took no position opposite to that of the Town. They did not contribute a unique perspective or additional grounds. Instead they supported wholeheartedly the position of the Town.
- [23] The respondents, in total, had seven lawyers attend the two-day hearing. This is not reasonable and certainly not within the expectation of any unsuccessful party to pay.
- [24] At the same time, I note that the applicants have not provided the court with their bill of costs. Courts have held that this failure undermines the applicants' objections, leading to an inference that they must have spent at least as much money on legal fees.
- [25] I find that the partial indemnity rates charged by the Town are reasonable. Those of SORE are significantly higher than the maximum partial indemnity rate as found in the Rules.
- [26] Taking into account all the circumstances of this case, and considering those factors set out in Rule 57.01, the Town of Niagara-on-the-Lake is awarded costs on this application fixed in the amount of \$110,000 inclusive of HST and disbursements.
- [27] SORE's costs shall be fixed in the amount of \$55,000 inclusive of HST and disbursements.



Walters J.