

Security for Costs Orders Against Environmental Groups Bolstered by *Pointes* Decision

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Courts are increasingly willing to order security for costs against environmental groups that challenge land developments through judicial review. In [Pointes Protection Association v Sault Ste. Marie Region Conservation Authority](#) (*Pointes*), the Court ordered an environmental group to post \$20,000 in security for costs. This emerging trend to impose additional financial risk on environmental groups raises important strategic issues for these groups when contemplating litigation.¹ It also effectively bars them from pursuing judicial review.

Background

In *Pointes*, a local residents' group opposed the development of a residential subdivision around the Point Louise wetland. The Pointes Protection Association (PPA) argued that the Conservation Authority that approved the subdivision did not have legal authority under its statute to approve a development that would destroy 46 hectares of wetlands. The PPA then brought a judicial review application.

1704604 Ontario Ltd. (the Developer) applied to the Court for and was granted party status on consent. The Developer then applied for security for costs. The Developer submitted that the PPA's financial state was uncertain. The Developer sought \$60,000 security for costs based on full indemnity.

The Developer argued that none of the individual residents sustained any risk in bringing an application for judicial review because the PPA was a corporation. The PPA countered that it had limited financial resources as a public interest litigant. The PPA noted that a security for costs order would effectively terminate the litigation.

¹ Other cases where Courts have made a costs order under Rule 56.01(1)(d) of the *Rules of Civil Procedure* are *Evolution de Future of Carnival Inc v Toronto Mas Band Association and Festival Management Committee*, 2012 ONSC 1628 (order made against a non-share capital corporation formed just for the purpose of litigation); *Durham Citizens Lobby for Environmental Awareness & Responsibility Inc v Durham (Regional Municipality)*, 2011 ONSC 7143 (order made against an environmental public interest litigant because the organization otherwise would have no risk in bringing the litigation).

The Costs Order

The Court considered when it may order security for costs. Rule 56.01(1)(d) of the *Rules of Civil Procedure* provides that a Court may order security for costs where

The plaintiff or applicant is a corporation or nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

The Court concluded that the PPA was not a true public interest litigant and therefore the Court could not shield the PPA from costs. The Court observed that the PPA represented the interests of only a minority of the residents in the area. The Court found that litigation did not affect the interests of the corporation, only the residents. Finally, the Court reasoned that, since the project would impact a localized area, the opposition appeared to stem from a “not-in-my-backyard” attitude.

Justice Del Frate wrote at paragraph 26:

I agree that the developer appears to have a greater capacity to bear the cost of this litigation. However, this does not mean that in every situation where one of the parties is in a better financial position, that party should not be entitled to costs. If that were the case, our courts would be even more congested than they are currently. There must be some deterrent in any type of litigation. Parties should seriously consider the consequences of engaging in any litigation especially one that can be as complicated, protracted, and expensive as this one.

Conclusion

Although the PPA managed to raise the money to pay the security for costs order,² not all non-profit corporations will be able to do so. As a result, the availability of judicial review may suffer. As with many legal issues, courts must balance the interests of groups that feel aggrieved with those of the respondents who have approvals to proceed with their projects.

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² Although they withdrew their application for judicial review and will proceed before the Ontario Municipal Board.