

COURT OF APPEAL FOR ONTARIO

CITATION: Windsor (City) v. Paciorka Leaseholds Limited, 2012 ONCA 601

DATE: 20120913

DOCKET: C54542

Doherty and LaForme JJ.A., and Turnbull J. (*ad hoc*)

BETWEEN

The Corporation of the City of Windsor

Appellant

and

Paciorka Leaseholds Limited, Bruce Paciorka, Gordon Paciorka, Elizabeth Frey,
Hilda Fisher House, Carlos Rafael Macchiavello, Virginia Rosalie Macchiavello,
Frieda Pope, Rachel Lydia Beattie, Sharon Lily Pope, Nancy Louise Hillman and
Judy Diane Listheaghe

Respondents

Stephen F. Waqué and Frank Sperduti, for the appellant

Paul Henry and Robert Lawson, for the respondents

Heard: April 4, 2012

On appeal from the decision of the Divisional Court of the Superior Court of Justice (Justice Thea P. Herman, Justice Alison Harvison Young and Justice Harriet E. Sachs (dissenting)), dated May 16, 2011, reported at 2011 ONSC 2876, dismissing an appeal from a decision of the Ontario Municipal Board dated December 14, 2009.

COSTS ENDORSEMENT

[1] The appellants seek costs as the successful party. The respondent seeks costs relying on s. 32(1) of the *Expropriations Act*, R.S.O. 1990, c. E-26.

[2] The respondent's reliance on s. 32(1) is misplaced. The section applies to the Ontario Municipal Board and not to this court, and is triggered when the Board has made an order awarding at least 85% of the amount offered by the expropriating party. We have set aside the order of the Board. There is no order of the Board in effect at this point. It cannot be said that the Board has "determined" that any amount is owed, much less an amount that meets the criteria in s. 32(1).

[3] If on the rehearing the respondents achieve an award that exceeds the amount referred to in s. 32(1), costs payable pursuant to this order and/or the respondents own costs arising from the appellate process may be recoverable under s. 32(1): see *Smith v. Alliance Pipeline Limited*, 2011 SCC 7, 1 S.C.R. 160, at paras. 62-66. The Board will have to make that determination if the issue arises.

[4] The appellants are entitled to their costs in the Divisional Court, on the leave application to this court, and on the appeal. Those costs should be on a partial indemnity basis. The parties are virtually *ad idem* on the costs in the Divisional Court. Having regard to the practice of this court and the doubtless

significant overlap in the preparation for the appeal in the Divisional Court and this appeal, the appellant's claim for costs in this court is excessive.

[5] We fix the costs as follows:

- costs of the Divisional Court appeal \$108,000;
and
- costs of the proceedings in the Court of Appeal
(the leave application and the appeal proper)
\$45,000.

[6] Unfortunately, these reasons dictate that further proceedings may be necessary to finally resolve the dispute between the parties. The respondents have not acted in a capricious or inappropriate manner in resisting the appeals brought by the appellant. We do not think it would be appropriate to require the respondents to pay the substantial costs of the appeals while the proceedings are still extant before the Board. Consequently, we direct that the costs awarded above are not payable until a determination is made by the Board, the matter is otherwise resolved, or this court orders otherwise.

“Doherty J.A.”
“H.S. LaForme J.A.”
“Turnbull J. (*ad hoc*)”