

COURT OF APPEAL FOR ONTARIO

CITATION: North Elgin Centre Inc. v. McDonald's Restaurants of Canada
Limited, 2022 ONCA 896

DATE: 20221222

DOCKET: M51329 & M51679 (C63933)

Brown J.A. (Motions Judge)

BETWEEN

North Elgin Centre Inc.

Applicant (Respondent)
(Responding Party/Moving Party on cross-motion)

and

McDonald's Restaurants of Canada Limited

Respondent (Appellant)
(Moving Party/Responding Party on cross-motion)

Andrew Parley, Margaret Robbins, and Sean Blakeley, for the moving
party/appellant, McDonald's Restaurants of Canada Limited

Jeffrey E. Streisfield, for the moving party on the cross-motion/respondent,
North Elgin Centre Inc.

Heard: December 7 and 8, 2020 by video conference

COSTS ENDORSEMENT

OVERVIEW

[1] McDonald's Restaurants of Canada Limited ("McDonald's") moved for an order declaring North Elgin Centre Inc. ("NEC") in contempt of the order of a panel of this court dated January 29, 2018 (the "Order"). NEC brought a cross-motion

seeking declaratory relief and directions. By reasons dated March 17, 2021, I dismissed the motion and cross-motion. I set out a timetable for submissions should any party decide to seek costs of the motions.

[2] NEC filed costs submissions on March 30, 2021; McDonald's filed submissions on April 6, 2021. Those submissions were only brought to my attention earlier this week. Obviously, this court's filing system did not work as it should have; for that I apologize to the parties.

[3] NEC, as the successful party on the contempt motion, seeks costs of \$153,368, calculated largely on a substantial indemnity basis. NEC made an offer to settle dated March 9, 2020 (the "Offer").

[4] McDonald's submits that NEC should be awarded costs of \$15,000. It submits that: the parties enjoyed divided success on the motions; the Offer did not comply with the requirements of r. 49 of the *Rules of Civil Procedure*; and the costs claimed by NEC are unreasonable.

ANALYSIS

Success on the motions

[5] While I dismissed both McDonald's motion and NEC's cross-motion, a holistic assessment of the motions leads to the conclusion that NEC enjoyed substantial success on this matter. As stated in para. 79 of my reasons, I treated much of NEC's relief in its cross-motion as forms of defence to McDonald's

contempt motion. As I decided the contempt motion on other grounds, it was not necessary to consider NEC's requests for relief. Accordingly, NEC, as the successful party, is entitled to costs of the matter.

Complexity

[6] The subject-matter of the motion was somewhat complex, involving as it did steps taken (or not taken) to obtain consent under the *Planning Act*, R.S.O. 1990, c. P.13.

[7] The circumstances of the motions were such that both parties should reasonably have expected a potential award of significant costs to the successful party: (i) the motion materials were of considerable length; (ii) the procedure for the matter went beyond the standard filing and testing of evidence to include submissions to a panel of the court as to who should hear the matter, as well as a settlement conference before a single judge of the court; (iii) oral argument of the motions took 1.5 days to complete; and (iv) significant financial interests evidently were at play, with the issues of importance to both parties. McDonald's could only expect that NEC would vigorously defend against the contempt motion.

The Offer

[8] NEC submits that its Offer bears "upon the reasonableness of North Elgin's conduct throughout and supports North Elgin's claim for predominantly substantial indemnity costs" from and after March 2020. NEC contends that "McDonald's

should have accepted North Elgin's offer and abandoned the motion for contempt."

McDonald's takes the position that the Offer does not attract substantial indemnity cost consequences because it did not comply with r. 49.

[9] I accept McDonald's submission that the Offer does not qualify as a r. 49 offer. The Offer contained terms that went well beyond the issue in the contempt motion, which was whether NEC had failed to comply with the Order. However, as I understand NEC's submission, it is not taking the position that its Offer complied with r. 49, thereby attracting cost consequences. Instead, it appears to submit that its Offer was a commercially reasonable effort to settle the contempt motion and, as such, is one factor the court should take into account when assessing the relative reasonableness of the parties' conduct on the motions.

[10] While the Offer certainly was an attempt to resolve the long-standing lease dispute between the parties, its terms strayed well beyond the narrow issue on the motion. Indeed, one term proposed reversing the responsibility for carriage of the *Planning Act* consent application, which would require a variation of the panel's Order. Accordingly, I place little weight on the Offer for purposes of assessing the reasonableness of the parties' conduct on the motions.

Scale of indemnification

[11] These were hard-fought motions brought by sophisticated commercial parties, each of whom had significant financial interests in the underlying property

development and use issues. The terms of the Offer do not justify departing from the basic principle of awarding costs on a partial indemnity scale. Nor did McDonald's engage in any unreasonable litigation conduct that would attract elevated costs. Consequently, I conclude that NEC, as the successful party, is entitled to costs of the motions fixed on a partial indemnity scale.

Hours claimed and hourly rates

[12] NEC's bill of costs seeks recovery for 307 hours of work by its counsel, Mr. Streisfield, a 1991 call. Counsel's full indemnity hourly rate was \$495 per hour. The bill of costs uses a substantial hourly rate of \$445 per hour and a partial indemnity rate of approximately \$300 per hour. No other timekeeper is identified in the bill of costs. The total costs sought by NEC of \$153,368 consist of the recovery of partial indemnity scale fees up to the date of the Offer of \$32,197.58 (using an hourly rate of just under \$300) and substantial indemnity scale fees thereafter of \$115,911.30 (using an hourly rate of \$445), together with slightly more than \$5,000 in disbursements.

[13] McDonald's submits that the costs claimed by NEC are unreasonable. McDonald's filed its bill of costs for the matter. It discloses that: 115 hours were spent by its counsel's four timekeepers (three lawyers and a law clerk); and a significant amount of the work was performed by those timekeepers who billed at

lower hourly rates than senior counsel. McDonald's bill of costs records that it incurred partial indemnity fees of just under \$30,000 for the matter.

[14] I accept McDonald's submission that the partial indemnity costs sought by NEC are unreasonable for several reasons. First, most of the voluminous record was prepared and filed by McDonald's, not NEC. Second, McDonald's team of lawyers and a law clerk were able to prosecute the motion and respond to NEC's cross-motion by incurring only one-third of the time claimed by NEC. Finally, NEC's counsel failed to delegate a significant part of the work to timekeepers who could have billed less than his hourly rate, which was based on 30 years of experience. While NEC's counsel may be a sole practitioner, there now exists in Ontario a vibrant market for contract legal services to which an experienced sole practitioner and his client can turn for lower-cost assistance in a case. If a sole practitioner and his client do not avail themselves of that market, then they should reduce claimed party-party fees to reflect that business choice.

[15] Taking into account the factors set out in r. 57.01 and the principles laid down in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) and subsequent cases, I conclude that a fair and reasonable award of partial indemnity costs to NEC is the amount of \$37,000, inclusive of disbursements and applicable taxes. That figure is calculated by applying an hourly rate of \$300 to 100 hours of work and adding the disbursements incurred.

[16] McDonald's shall pay NEC the award of \$37,000 on or before January 31, 2023.

[17] Again, I offer the parties apologies for the delay our court took in processing their cost submissions.

“David Brown J.A.”