CITATION: Magder v. Ford, 2013 ONSC 1842
DIVISIONAL COURT FILE NO.: 560/12
DATE: 20130402

SUPERIOR COURT OF JUSTICE - ONTARIO
(DIVISIONAL COURT)

RE: PAUL MAGDER, Respondent on Appeal

- and -

ROBERT FORD, Appellant

BEFORE: Then R.S.J., Leitch and Swinton JJ.

COUNSEL: Alan J. Lenczner, Q.C. and Andrew Parley, for the Appellant

Clayton C. Ruby and Nader R. Hasan, for the Respondent

HEARD at Toronto: by written submissions

COSTS ENDORSEMENT

The Court:

[1] The appellant Robert Ford seeks costs of the appeal to the Divisional Court, the stay motion and the application before Hackland R.S.J. on a partial indemnity basis in the amount of $107,070.00, plus disbursements of $8,974.00 and HST.

[2] The respondent submits that there should be no order of costs on the basis that he was acting as a public interest litigant. He argues that only an elector can pursue an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("*MCIA*"), and an award of costs may deter citizens from pursuing relief under the Act. As well, he argues that the appellant is likely to be indemnified for his legal fees, at least in part, through insurance and the indemnity programs of the City of Toronto.

[3] The appellant takes the position that the respondent was not a public interest litigant, as he was in the pursuit of a political agenda. Moreover, the appellant submits that an adverse costs award was in the reasonable contemplation of the respondent, who was not at risk of paying legal fees to his own lawyers, who stated that they were acting *pro bono*.

[4] Courts have exempted public interest litigants from an adverse costs order where the litigants have no direct pecuniary or other material interest in the proceeding or where their pecuniary interest is modest in comparison to the costs of the proceeding (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at para.76).

[5] We note that courts have not taken the view that there is a blanket public interest exemption for electors who pursue an application under the *MCIA*. Costs have been awarded in a number of such cases: for example, *Sharp v. McGregor* (1988), 64 O.R. (2d) 449 (Div. Ct.); *Van Schyndel v. Harrell* (1991), 4 O.R. (3d) 474 (Gen. Div.); *Downes v. Kingston (Mayor)*, [2008] O.J. No. 3102 (S.C.J.).

[6] In general, costs follow the event, and the successful party can expect to receive costs. However, in the present case, we are of the view that no costs should be awarded for three reasons.

[7] First, success in the proceeding was divided. While the appellant succeeded on the appeal, he was unsuccessful on three of the four grounds he raised on appeal - namely, the interaction of the municipal code of conduct and the *MCIA*, the impropriety of voting when a code sanction has a financial aspect, and the lack of a defense under s. 10(2) because of wilful blindness.

[8] Second, this proceeding raised novel legal issues with respect to matters of public importance, with the result that there has been a clarification of the interaction between municipal codes of conduct and the *MCIA*, as well as the scope of the defense of inadvertence or error in judgment in s. 10(2) of the *MCIA*. While we would not characterize the respondent as a "public interest litigant" just because he brought this litigation as an elector, the clarification of significant and novel legal issues is in the public interest. We note that the Court of Appeal adopted the same approach to costs in *Orangeville (Town) v. Dufferin (County)*, [2010] O.J. No. 429 at para. 34, stating, "...this case raises novel issues of interpretation of the *MCIA* and is a matter of public interest. As a result, I would make no order as to costs."

[9] Third, at the time that the respondent launched this application, the decision imposing the sanction of reimbursement on the appellant had not been found to be invalid, and the appellant had not challenged its validity. In the circumstances, it was reasonable for the respondent to pursue the application.

[10] Accordingly, we order that each party bear his costs of the appeal, the stay motion and the application.

Then R.S.J.

Leitch J.

Swinton J.

Released: APR 02 2013