
**THE EXPOSURE OF DIRECTORS TO COSTS IN
LITIGATION: A CASE COMMENT**

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A. INTRODUCTION

On February 6, 2009, Justice R.C. Boswell of the Ontario Superior Court of Justice released his costs endorsement in *Alaimo v. Di Maio* (“*Alaimo*”),¹ litigation between former volunteer directors of a charity. From the perspective of charitable and non-profit organizations, the most pertinent aspect of the Court’s endorsement was the determination that the applicants, who were former volunteer directors of the charity Hospice Vaughan, were liable for the costs of litigation despite the fact that the litigation was generally related to the charity. In this regard, the result of the Court’s decision differs from the result of the Ontario Court of Appeal in *The St. James’ Preservation Society v. Toronto (City)* (“*St. James’ Preservation Society*”)² where the directors of a non-profit corporation were not held to be personally liable for the costs of litigation.³ However, in determining that the facts of the *Alaimo* case warranted costs to be ordered against the Applicants, the reasoning of Justice Boswell accords with the general principles of costs liability that were set out by the Court of Appeal in *St. James’ Preservation Society*.

This *Charity Law Bulletin* reviews the *Alaimo* case and discusses its implications on charities and their directors.

¹ *Alaimo v. Di Maio*, [2009] O.J. No. 526, 2009 CanLII 4848 (S.C.J.).

² 2007 ONCA 601.

³ For commentary on this case, see Terrance S. Carter & Nancy E. Claridge, “Decision is Warning to Sham Corporations”, *Charity Law Bulletin* 123 (25 September 2007), online: <<http://www.carters.ca/pub/bulletin/charity/2007/chylb123.htm>>.

B. BACKGROUND TO THE DECISION

The costs endorsement was a supplement to the reasons for judgment in the main decision, which was released on June 18, 2008.⁴ Justice Boswell’s introduction to his reasons for judgment provides an apt summary of the nature and tenor of the dispute:

Hospice Vaughan is a charitable organization dedicated to providing care to individuals facing life threatening illnesses and their families.

...

The services provided by the Hospice are important and they are provided in difficult and often tragic circumstances.

...

The Hospice is a place of compassion and tenderness, of community spirit, of dedication and charity. It is arguably the last place one would expect to find a derisive and costly power struggle for stewardship of a group of volunteers and charitable programs. Yet we are faced with exactly that: an epic struggle for control of the Board of Directors. This struggle has been very costly to the Hospice. It has been depressingly expensive financially and, perhaps more profoundly, has tarnished the reputation of the Hospice in the community.⁵

Generally stated, the case involved a dispute over the election of the Board of Directors of Hospice Vaughan, between a group of outgoing directors (the “Applicants”) and individuals representing the new Board of Directors (the “Respondents”).⁶ The Court’s involvement in the election arose from a separate court application that was made in 2006, which resulted in a court-ordered election and the appointment of an arbitrator to determine any subsequent issues. The former directors appealed a number of the arbitral rulings and eventually sought to have the election results set aside on the basis of unfairness.

Ultimately, the Court held that there was no basis on which to set aside the election results and therefore, the application was unsuccessful. However, because the parties could not agree on the apportionment of the costs of the proceedings, the Court had to make a further determination on the matter.

⁴ [2008] O.J. No. 3570, 2008 CanLII 46326 (S.C.J.).

⁵ *Ibid.* at paras. 1, 4 and 5.

⁶ Note that the members of the new Board of Directors were not actually listed as the responding parties in this case. Although the Court stated that this was not the most appropriate style of cause, it recognized that the named respondents did represent the parties who wished to see the election results confirmed (i.e. the new Board of Directors).

C. THE DECISION

Although the Court discounted the costs as a result of the Respondents' acrimonious conduct that contributed to the dispute, it was held that the Applicants were liable for the costs of the proceedings. In reaching this decision, the Justice Boswell rejected a number of arguments that the Applicants made against the general principle that the losing party should bear the costs of a judicial proceeding. Several considerations should be of particular interest to charitable organizations.

The Applicants submitted that as former directors of the charity, they were volunteers with no personal interest in the dispute. Rather, the litigation was commenced in the pursuit of the best interests of the charity, and an award of costs against the Applicants "would have a chilling effect and deter individuals from becoming members of boards of charitable organizations."⁷ The Court disagreed, and in doing so, distinguished two previous cases in which costs were not awarded. In one case, the volunteers were members of a volunteer tribunal whose decision was being challenged.⁸ Because those volunteer tribunal members were engaged in a form of judicial decision-making, it would be quite prohibitive if they were subject to orders of costs against them in the course of making decisions in good faith. This was not the case for the volunteer directors in *Alaimo*, who faced no inherent risk of costs simply arising from being in the position of a director. The Court stressed that it was only a result of their decision to litigate that the directors put themselves at risk. A second case involved a refusal to award costs because the court had found that the party's motives were "pure".⁹ Justice Boswell did not accept that "there is a general legal principle that the purity of motives of the losing party is a justification for refusing to award costs."¹⁰ The Court did state a general principle that "courts must be careful not to deter public participation in charity organizations."¹¹ However, Justice Boswell did not believe that a costs award, in light of the circumstances in *Alaimo*, would have a general deterrent effect on public participation in charities.

Another relevant issue was whether or not the objectives of a charity should be considered in an award of costs. The Applicants submitted that an award of no costs would best serve the objectives of the hospice. The Court rejected this argument, stating that the objectives of the hospice were a neutral consideration because it

⁷ *Alaimo* at para. 15.

⁸ *Barron v. Warkentin* (2005), 2005 ABCA 351.

⁹ *Eco-Tourism 2010 Society v. Vancouver 2010 Bid Corp.* (2005), 2005 BCPC 23 (Sm. Cl. Div.).

¹⁰ *Alaimo* at para. 19.

¹¹ *Ibid.* at para. 20.

was not a party to the proceedings and thus would not benefit nor suffer from a costs award, and neither the Applicants nor the Respondents were actually on the Board of Directors at the time of the application. However, the Court did not dismiss the general importance of the charity's objectives, stating that the objectives of the hospice may be a relevant consideration if the hospice was a party to the proceedings.

D. COMMENTARY

The case of *St. James' Preservation Society*, mentioned above, already provides judicial guidance in relation to public interest litigation. That decision suggested that "organizations incorporated for the purpose of pursuing a public interest need to address a number of issues prior to engaging in costly litigation in order to protect directors from potential personal liability, including the ensuring the following:

- the organization has a genuine interest in the outcome of the litigation. A history of activity by the organization related to the public interest issue may help demonstrate this interest;
- the organization is not acting to vindicate a private interest, and the individual directors do not stand to gain personally from the litigation;
- the litigation involves novel issues that have not previously been interpreted by the courts and are not the subject of settlements; and
- no other potential litigants would be better suited to bring the litigation."¹²

Because *St. James' Preservation Society* was not considered in *Alaimo*, it is unclear whether or not the same principles would be applicable in a situation where the directors were not necessarily litigating for the public interest, but rather that the dispute occurred within a charity and was allegedly for the best interests of the charity. In this regard, although Justice Boswell awarded costs against the Applicants, he affirmed that it was important not to deter public participation in charitable organizations.

Although it is clear that the Applicants consciously chose to pursue litigation and this was a major reason for awarding costs against them, it is factually noteworthy that Justice Boswell commented that "[t]he risk of costs was discussed very clearly in a case management hearing with Justice Bryant on April 2, 2008, well before the application proceeded."¹³ It was also remarked that the Applicants had already spent substantial sums of the charity's money while they were directors, and chose to continue litigating even after the election was complete. Given these statements, it is uncertain whether an order of costs would have been as

¹² Terrance S. Carter & Nancy E. Claridge, *supra* note 3.

¹³ *Alaimo* at para. 17.

appropriate if the Applicants had not received a clear warning from the previous judge or if the Applicants had not continued to pursue litigation after the election had been completed. Given the particular facts of this case, no firm conclusions can be reached as to whether or not it is a principle of general application that volunteer directors will always be liable for costs if they choose to litigate in the interests of their charity.