

Ontario Land Tribunal
Tribunal ontarien de l'aménagement
du territoire



ISSUE DATE: October 19, 2021

CASE NO(S): LC200004

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*,
R.S.O. 1990, c. E.26, as amended

| | |
|-------------------------------|---|
| Claimant: | White Star Group of Companies |
| Respondent: | City of Hamilton |
| Subject: | Land Compensation |
| Property Address/Description: | 271 Bay St. N, 107 Stuart St. & 34-36 Tiffany St. |
| Municipality: | City of Hamilton |
| LPAT Case No.: | LC200004 |
| LPAT File No.: | LC200004 |
| LPAT Case Name: | White Star Group of Companies v. Hamilton (City) |

PROCEEDING COMMENCED UNDER subsection 12(1) of the *Local Planning Appeal Tribunal Act*, 2017, S.O. 2017, c. 23, Sched. 1, and the Tribunal's Rules of Practice and Procedure

| | |
|--------------|-----------------------|
| Request by: | City of Hamilton |
| Request for: | Motion for Directions |

Heard: Heard in writing

APPEARANCES:

Parties

Counsel*/Representative

City of Hamilton

Patrick MacDonald*

White Star Group of Companies

Daniel Richter* and Marino Rakovac

DECISION DELIVERED BY R.G.M. MAKUCH AND ORDER OF THE TRIBUNAL

MOTION

[1] The City of Hamilton ("City") brings a Motion for an award for costs in favour of the City on a substantial indemnity basis pursuant to the Tribunal's Rule 23 in the amount of \$21,310.65 plus HST, payable by the White Star Group of Companies ("White Star") and its principal Marino Rakovac, jointly and severally, pursuant to s. 20 of the *Ontario Land Tribunal Act*. The request for costs arises from the Tribunal's decision in this matter dated April 14, 2021 granting the City's Motion to dismiss White Star's claim. The Tribunal directed that this Motion be considered and disposed of in writing in accordance with the Tribunal's direction dated May 14, 2021 and the Tribunal's Rule 23.

[2] The materials before the Tribunal on this Motion are the following:

- 1) The City's Motion Record dated June 15, 2021, including the Affidavit of Jillian Manser, sworn June 14, 2021;
- 2) White Star's Response to the City's Motion dated July 1, 2021, including the Affidavit of Marino Rakovac, sworn July 1, 2021; and
- 3) The City's Reply to White Star's Response dated July 7, 2021.

[3] The Tribunal's Rule 23.9 states that the Tribunal may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous, vexatious or if the party has acted in bad faith. Rule 23.9 also sets out some circumstances where a costs order may be made.

CITY GROUNDS FOR THE MOTION

[4] The City submits that the following grounds for such conduct under Rule 23.9 are met in this matter:

- i. (b) failing to give notice without adequate explanation, lack of co-operation with other parties during the proceedings, changing a position without notice to the parties, or introducing an issue or evidence not previously mentioned or included in a procedural order;
- ii. (d) a course of conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
- iii. (g) acting disrespectfully or maligning the character of another party;
- iv. (h) knowingly presenting false or misleading evidence;

[5] Specifically, the City alleges that White Star, its Principal Mr. Rakovac, and/or its representatives conducted themselves as described below following the filing of the City's Notice of Motion to dismiss on June 18, 2020:

- a) In submissions to the Tribunal, repeatedly and without basis, attacked the City's legal counsel's professionalism without basis, and demanded that the City's counsel be removed from the file.
- b) Tried to circumvent the City's legal counsel by trying to put questions directly related to this litigation to the City Clerk's office without informing the City's legal counsel. When legal counsel objected, White Star used that objection to baselessly claim on a separate motion that the City's legal counsel was exerting influence on City staff and coaching witnesses.
- c) Threatened to bring a complaint against the City's legal counsel to the Law Society of Ontario if the City did not agree to either adjournment of the motion to dismiss or settlement of White Star's claim by way of compensation.
- d) Conducted examinations for discovery of a sitting City Councillor and former mayor in secret without informing the City's legal representative or

giving its legal counsel an opportunity to participate as is the City's right, and have admitted that they deliberately excluded the City from those examinations in contravention of the Rules of Civil Procedure.

- e) Refused to hold a cross-examination on a two-page affidavit by way of videoconference in the middle of the pandemic (despite the Superior Court's direction that in-person appearances be avoided wherever possible), and forced the City to bring a motion to prevent an in-person appearance rather than consent to this reasonable request. When the Tribunal granted the City's request to convert the examination to one by videoconference, White Star opted to proceed by written questions instead of a videoconference examination, rendering the entire motion a moot point and waste of time and effort.
- f) Despite the Tribunal's prior direction on July 6, 2020 for the parties to try and scope the issues and evidence on the City's motion to dismiss, White Star instead attempted to introduce a raft of new evidence ahead of the oral argument of the motion on September 28, 2020, the vast majority of which the Tribunal refused to admit as evidence on the motion.
- g) Requested a last-minute adjournment of the oral argument of the motion on September 28, 2020 due to circumstances entirely of their own making, which necessitated significant last-minute work by the City to respond and ultimately caused the motion to be unable to be heard on September 28, 2020 and to be converted into a motion in writing.
- h) Retained a lawyer who was no longer permitted to practice law to represent them on this Motion, and when the City's legal counsel exercised valid professional obligations by raising issues with that lawyer's participation, White Star and its representatives characterized that action as threats or harassment.

[6] The particulars of the alleged objectionable misconduct is set out in the Affidavit of Jillian Manser, sworn, June 14, 2021.

[7] The City maintains that the conduct of White Star, Marino Rakovac, and their representatives in this matter is well outside the normal range of conduct that is to be expected between parties in a contested matter before the Tribunal. The City further maintains that the level of misconduct has not only caused unnecessary delay, additional work, and frustration for the City and the Tribunal, but has seen White Star, Mr. Rakovac, and their representatives repeatedly engaged in reprehensible, scandalous and outrageous conduct, which merits censure from the Tribunal by way of an award of costs on a full or substantial indemnity basis.

[8] The evidence of this misconduct according to the City is also found in written communications from White Star or its representatives, frequently provided directly to the Tribunal or case coordinator for this matter.

[9] Mr. Rakovac made repeated requests to the City Clerk's office for information related to the matter before the Tribunal, copying other representatives from his company in this matter (Mr. Winkelmann and Mr. Richter), but neglected to copy the City's legal counsel. The inclusion of his two representatives on these communications demonstrates that these communications were undoubtedly related to this matter before the Tribunal according to counsel for the City. The City's legal counsel responded to these requests by informing White Star's representatives that as these inquiries were related to active and ongoing litigation, they should be directed to the City's legal counsel for response. The City maintained that the requests for documents were premature at that time, as discovery for this matter would occur at a later date, pursuant to the *Rules of Civil Procedure*, which govern expropriation proceedings before the Tribunal. Despite this request, Mr. Rakovac followed up with another email to the City Clerks' office (again copying his own representative but not the City's legal counsel), the City's legal counsel again reiterated the request that all communication related to this litigation be directed to legal counsel and not directly to City staff.

[10] The City had brought a motion to dismiss the matter without a hearing on June 18, 2020 ahead of the first scheduled Case Management Conference (“CMC”) on July 6, 2020. At this CMC, the Tribunal directed that the matter be adjourned to hold the Motion by videoconference, which was scheduled for September 28, 2020. The City maintains that White Star’s conduct since the CMC on July 6, 2021 merits an award of costs.

[11] As another example of White Star’s unreasonable conduct, counsel for the City refers to White Star’s request to examine the City’s affiant (Darlene Cole) on its Motion to Dismiss, as is its right and to which the City consented. White Star however, refused to hold the examination electronically or in writing despite the ongoing COVID-19 pandemic. White Star informed the City that it would only hold the examination virtually if a motion was brought forcing it to do so. When the City brought that Motion, White Star filed responding submissions that baselessly accused the City’s legal counsel of severe and ongoing misconduct, in addition to raising highly inappropriate and offensive issues regarding Ms. Cole’s confidential health information. Counsel for the City argues that White Star took what should have been a very reasonable request and turned it into an unnecessary motion to the Tribunal and made repeated personal attacks upon the City’s legal counsel’s character and conduct with no basis for doing so.

[12] On August 20, 2020, White Star served the City with a Notice of Examination for Darlene Cole to be held in person on September 8, 2020. The City had not previously been canvassed for availability on that date. The City soon thereafter requested that the date for the examination be moved to September 9, 2020 due to a scheduling conflict and that the examination be converted to an examination by videoconference in accordance with current practices due to the COVID-19 pandemic. The City made multiple attempts to obtain White Star’s consent to have the examination proceed by video, including pointing out current best practices in the profession to deal with the pandemic and the direction of the Superior Court. Notwithstanding this, White Star’s counsel indicated his client would not consent to an examination by video unless specifically directed to do so by the Tribunal forcing the City to bring a motion to convert

the examination of Ms. Cole to an examination by videoconference. The City subsequently made the request by Written Motion, which was granted by the Tribunal.

[13] The City states in its submission that White Star had filed a Response, but instead of merely responding to the substance of the City's Motion to convert the examination, it raised allegations of misconduct by the City's legal counsel and made highly unusual submissions regarding Ms. Cole's health information including inappropriate and baseless accusations, that White Star "suspects coaching and heavy-handed tactics are being used by the City's legal department against City of Hamilton employees in order to cover up the City's liability in this matter," an allegation supported by an Affidavit from Mr. Rakovac. White Star claimed that an in-person examination was necessary to "avoid any possibility of coaching occurring," a submission also supported by an Affidavit from Mr. Rakovac. White Star also claimed that "it is commonly known that people who have recently undergone cancer treatment or been diagnosed as HIV positive have immune systems that are compromised and must take special precautions that the general population need not take." They claimed that the City was exaggerating the risk of COVID-19 to Ms. Cole as the City had produced no evidence that she had such a health condition that would prevent an in-person examination.

[14] The City's materials on that successful Motion, noted that due to the ongoing COVID-19 pandemic, most City Legal staff were working remotely at that time (and continue to do so at the time of this Motion), and the Superior Court had directed counsel to conduct as much work remotely as possible and urged cooperation between opposing counsel in doing so. Notwithstanding this direction, White Star refused to consent to an examination on a two-page Affidavit to be conducted electronically or by interrogatories. Very shortly after the Tribunal issued its decision directing that the examination of Ms. Cole should be conducted by video, White Star's counsel notified the Tribunal and the City that it did not wish to proceed with the rescheduled video examination but to proceed instead by written interrogatories, notwithstanding that the City had previously offered this as an alternative course of action to avoid a motion.

[15] The City states that White Star subsequently filed more than 80 written questions on Ms. Cole's two-page Affidavit. A significant number of these questions were an attempt to restate White Star's arguments without engaging Ms. Cole on the narrow substance of her Affidavit. The City argues that this unnecessary and vexatious conduct by White Star on written interrogatories necessitated significantly more time and effort in preparing a response from the City than had an electronic cross-examination been conducted, which would have allowed for questions to be reworded rather than outright refused. Further, White Star's decision to proceed by written interrogatories immediately following its unsuccessful opposition to the Motion to convert Ms. Cole's examination rendered moot that entire motion and time spent by the City and Tribunal responding.

[16] In another example of White Star's unreasonable conduct, the City refers to White Star having conducted examinations for discovery of a sitting City Councillor (Terry Whitehead) and former Mayor (Larry Di Ianni) in secret without informing the City or giving its legal counsel an opportunity to participate as is the City's right under the *Rules of Civil Procedure*. White Star has admitted to the Tribunal that they deliberately excluded the City due to groundless claims that the City's legal counsel would intimidate witnesses from his own client. The City later received transcripts of the examination of these two witnesses.

[17] The City notes in its submission that these examinations were held in-person on September 8, 2020, on the same date and at the same location where White Star initially advised the City it would be holding the examination of Ms. Cole before the Motion for Conversion described above. Mr. Richter had previously advised that the September 10, 2020 examination date for Ms. Cole had been cancelled, but made no mention of the September 8, 2020 date at that time or prior to sending copies of the transcripts to the City. The City received no prior notification that these examinations were taking place and was not given an opportunity to participate. The City argues that is not a minor issue given that the *Rules of Civil Procedure* (which apply to this matter pursuant to the Tribunal's Rule 26.16) require that every party in a matter be provided

notice of an examination and an opportunity to participate. White Star deliberately withheld that notice from the City, by its own admission. The City maintains that this was a deliberate abuse of process by White Star and notes that the Tribunal struck the transcripts from its record on this basis.

[18] The City's submissions refer to further allegations by the representative for White Star at the time, Axel Winkelmann, who wrote to the City with a summary of "highlights" from the transcript of these examinations including allegations of a "massive cover-up", which purportedly exposed "the conduct of the City legal department to some scrutiny with respect to the suppression of evidence.", and a claim that the City's legal counsel must withdraw from the matter because they were an unsworn witness when filing the City's reply on the Motion to Convert Ms. Cole's examination as described above, demanding that the City's legal staff needed to "update and refer matters to Council before things literally go where no one wants them to go." Of particular note according to counsel for the City is a passage, wherein Mr. Winkelmann threatened to report the City's legal counsel to the Law Society of Ontario if the City did not agree to adjourn the September 28, 2020 Motion or engage in settlement discussions regarding White Star's claim:

At this Juncture, Mr. Rakovac and White Star just want to be made whole again. They lost their business for which they need to be compensated and they have suffered greatly financially. White Star started in 2005 with \$39,000 of debt, which now exceeds \$10 million not including the loss of their business. Should the matter not settle now, White Star will have no option but to go for full compensation, the implications being a significantly higher risk and financial exposure for the City.

It is our intent that, failing resolution of any adjournment and/or settlement initiative, White Star will file a complaint with the Law Society of Ontario and will request an inquiry into the City's conduct.

[19] Furthermore, the City argues that transcripts of the examinations of Mr. Di Ianni and Mr. Whitehead show that a substantial part of the examinations were conducted by Mr. Rakovac, despite White Star's lawyer Mr. Richter being in attendance and that this is improper as Mr. Rakovac is already a witness on this same motion and therefore is not permitted to conduct an examination of another witness.

[20] The City also argues that White Star's refusal to narrow the issues in advance of the hearing of the City's Motion to dismiss despite the Tribunal's direction to do so is further evidence of White Star's unreasonable conduct throughout this proceeding. White Star, according to counsel for the City, also attempted ahead of the September 28, 2020 Motion, to introduce a raft of new evidence and issues in an effort to litigate the entire history of the matter before the Tribunal, rather than addressing the narrow jurisdictional question that was the basis of the City's motion to dismiss. The Tribunal adjourned the September 28, 2020 Motion to a later date as a result of White star's lack of preparedness resulting in a waste of time and effort on the part of the City. The Tribunal, in its October 1, 2020 Decision, directed that the City's motion would be conducted in writing.

WHITE STAR RESPONSE TO CITY MOTION

[21] White Star's Response to the City's Motion for Cost is a continuation of its previous submissions against the City's Motion to dismiss and is an attempt to relitigate that motion, which resulted in the Tribunal Decision dated April 14, 2021. White Star's submissions do not address the issues raised by the City as to its conduct other than to state generally that the conduct complained of was not frivolous or vexatious.

[22] The submissions do continue the pattern of making unfounded allegations of bad faith and bias against the City and its counsel. The submissions were not particularly useful in the context of this Motion other than to confirm the City's allegations and arguments on this Motion for Costs.

[23] The submissions do not refute or provide any explanation for several of the instances of misconduct raised in the City's Motion, including:

- a. attacks on the City's legal counsel's professionalism, including groundless accusations of harassment and intimidation; and
- b. threatening to bring a complaint to the Law Society of Ontario against the City's legal counsel if an adjournment or settlement was not reached;

[24] White Star's Response is a continuation of the very conduct forming the basis for the City's Motion for Costs including but not limited to continuing to groundlessly accuse the City's legal counsel of coaching witnesses, intimidation, or suppressing evidence. The submissions also confirms that the examinations of Mr. Whitehead and Mr. Di Ianni were conducted without the City present, and that this was done deliberately, in flagrant violation of the *Rules of Civil Procedure*.

[25] The Response requests that White Star be awarded costs against the City but does not provide grounds under the Tribunal's Rules upon which the Tribunal could make such an award.

FINDINGS

[26] The Tribunal has carefully considered the evidence before it as well as the submissions of counsel as well as representative for White Star and finds that it should exercise its discretion to make an award of costs in favour of the City. The Tribunal's decisions in this proceeding have consistently found that White Star's conduct was unreasonable, unnecessary, and in most cases without legal basis. Despite these consistent findings by the Tribunal, White Star did not redress or change its pattern of behaviour but rather actively took steps to further complicate the issues, contrary to the Tribunal's directions.

[27] The Tribunal finds that White Star has engaged in a repeated and deliberate pattern of unreasonable, vexatious, and bad faith conduct over an extended period of time in this case and was simply attempting to relitigate the entirety of the history of the matter instead of dealing with the substance of the actual Motion before the Tribunal.

[28] Tribunal jurisprudence on the issue of costs has consistently found that the test used for awarding costs is summarized as follows in *Malcolm v. Scugog (Township)*, 2020 CarswellOnt 2161 (LPAT), at paragraph 10 :

...would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure, exclaim "that's not right; that's not fair; that person ought to be obligated to another in some way for that kind of conduct."

[29] The Tribunal finds that not only was the conduct of White Star and Mr. Rakovac consistently vexatious and inappropriate, it also regularly resulted in significant time spent by the City and the Tribunal, including forcing the City to file unnecessary motion materials by taking unnecessary steps, and attempting to introduce large numbers of irrelevant documents into the record at the last minute prior to hearing of the Motion to Dismiss. The record before the Tribunal is quite clear that White Star does not refute or provide any explanation for several of the instances of misconduct raised in the City's motion, including:

- attacks on the City's legal counsel's professionalism, including groundless accusations of harassment and intimidation;
- threatening to bring a complaint to the Law Society of Ontario against the City's legal counsel if an adjournment or settlement was not reached;
- continuing to groundlessly accuse the City's legal counsel of coaching witnesses, intimidation, or suppressing evidence.

[30] White Star has confirmed that the examinations of Mr. Whitehead and Mr. Di Ianni were conducted without the City present, and that this was done deliberately, in flagrant violation of the *Rules of Civil Procedure*.

[31] It is clear from the evidence that Mr. Rakovac's conduct throughout this proceeding has been both as a witness and an advocate, which demonstrates that Mr. Rakovac is the "true litigant" in this matter and that therefore any award for costs should be made against him personally, jointly and severally with White Star. In fact, in his Affidavit sworn June 25, 2021 included as part of White Star's response to Motion to this Motion for Costs, he refers to himself as the "primary initiator" of White Star's claim

against the City.

[32] White Star's Response raises a number of matters that have no connection to the grounds of the City's request for costs and are again a clear attempt to relitigate its arguments on the City's Motion to Dismiss.

[33] With respect to White Star's request for its costs of the City's Motion to Dismiss the claim which resulted in the Tribunal's decision dated April 14, 2021, Tribunal Rule 23.1 provides that any request for costs must be made within 30 days after the Written Decision is issued. The Tribunal's decision on the City's Motion to dismiss was issued on April 14, 2021, and it is again clear that White Star's request made in its Response Record dated July 2, 2021 does meet the 30 day deadline imposed by the above referred to Rule 23.1. White Star's request is therefore denied.

[34] The Tribunal finds that the consistent pattern of behaviour demonstrated by White Star, Mr. Rakovac, and their representatives amounts to a course of conduct that is unreasonable, vexatious, and bad faith as described in the City's Motion. The Tribunal agrees with the City's submission that this conduct was reprehensible, scandalous, and outrageous, which merits an award of costs on a full or substantial indemnity basis. Of particular note is the repeated attacks on the City's counsel in this matter, making allegations without any basis whatsoever of coaching witnesses, suppressing evidence, intimidating City staff, and threatening or harassing opposing counsel, as well as threatening to report the City's legal counsel to the Law Society of Ontario for professional misconduct solely as part of an attempt to gain leverage in this matter.

[35] The Tribunal has previously found that an individual (even where a non-party) can be jointly or severally liable for their conduct that contributed to an award for costs where they are the "true litigant" in a matter.

[36] The Tribunal finds that while Mr. Rakovac is not personally the registered owner of any of the lands in question, there can be no doubt that he is the true owner and

controlling mind of the White Star group of companies. The Tribunal's Record shows that on the Appellant form included with the original Notice of Arbitration and Statement of Claim issued in January, 2020, under "Appellant Information", Mr. Rakovac is listed as an Appellant in addition to the White Star group of companies and on that same form, despite listing a Cliff Lloyd as a lawyer and representative, the Declaration section of the form includes Mr. Rakovac's name under "Appellant/Representative."

Furthermore, there have been no other officer or director of White Star tendered in these proceedings to provide evidence other than Mr. Rakovac. In his Affidavit sworn June 29, 2020 in support of White Star's initial response to the City's Motion to Dismiss, Mr. Rakovac refers to himself as "the officer and director of the White Star Group of Companies".

[37] The Tribunal therefore finds that Mr. Rakovac should be responsible jointly and severally for the payment of the City's costs in this matter.

ORDER

[38] The Tribunal hereby orders that the White Star Group of Companies ("White Star") and its principal Mr. Rakovac, jointly and severally pay the amount of \$21,310.65 plus HST, to the City of Hamilton pursuant to s. 20 of the *Ontario Land Tribunal Act*

"R.G.M. Makuch"

R.G.M. MAKUCH
VICE-CHAIR

Ontario Land Tribunal

Website: olt.gov.on.ca Telephone: 416-212-6349 Toll Free: 1-866-448-2248

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal ("Tribunal"). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.