

Morris awarded \$45k in costs after Conflict of Interest ruling

By Brock Weir

Aurora resident George Hervey, who brought an unsuccessful lawsuit against Phyllis Morris alleging she broke the Municipal Conflict of Interest Act, has been ordered to pay \$45,000 in legal fees to the former mayor.

Justice Cory Gilmore rendered her decision last week directing Mr. Hervey to pay \$45,000 plus HST to Ms. Morris for the case which was covered by the Town's insurance.

The decision came after a decision earlier this year which dismissed Mr. Hervey's lawsuit on two crucial areas ? timing and knowledge. His complaint stems from Ms. Morris' ultimately aborted lawsuit against three local bloggers, among others, for \$6 million alleging they had information that could identify anonymous posters on the Aurora Citizen blog which Ms. Morris claimed were defamatory.

Although the previous Council authorised the lawsuit to go ahead by voting to bring ?any and all resolution? to the matter in a late night Council meeting in September 2010, Mr. Hervey alleged Ms. Morris breached the Municipal Conflict of Interest Act by participating in the meeting leading up to the vote (but not the vote itself) claiming she had a pecuniary interest in the matter.

Justice Gilmore ruled Ms. Morris had no reason to believe she had a pecuniary interest at that point in time, and also concluded Mr. Hervey was too late in filing his claim under the terms set out in the act.

While Ms. Morris was successful in receiving costs, which will ultimately reimburse the insurer, the \$45,000 was substantially less than the costs her lawyer, Steven O'Melia, sought. According to Justice Gilmore's decision, Ms. Morris sought \$111,295.96 on a substantial indemnity basis plus over \$6,000 in disbursements.

Within Justice Gilmore's ruling, Ms. Morris' lawyer argued that Mr. Hervey was aware that he would be subject to costs if Ms. Morris was successful. The complexity of the argument at hand was also cited in the arguments, including four days spent outside the court cross-examining 10 witnesses, and Mr. Hervey's conduct should also be taken into consideration for the ruling.

?He pressed forward with the matter, notwithstanding the fact he knew the risk related to the limitation period issue and had sought a legal opinion more than six weeks before the application was commenced,? said Justice Gilmore in her summation of Ms. Morris' arguments. ?Further, the applicant demonstrated his personal animosity towards the respondent.?

It was also argued the lawsuit was a ?strategic initiative by an organized group of former political opponents? of Ms. Morris, rather than something in the public interest, as Mr. Hervey suggested.

?Public interest? was a key factor in Mr. Hervey's argument, claiming that no costs should be awarded because the lawsuit was brought forward for that reason. He claimed the substantial indemnity amount sought by Ms. Morris was ?grossly disproportionate to the complexity of the proceedings? and while he conceded he was aware he would have to pay costs if unsuccessful, it ?far [exceeded] what he would have reasonably expected to pay.?

?This is a public interest litigation in which the applicant had no pecuniary interest or other material interest in the outcome,? said Justice Gilmore on Mr. Hervey's position. ?He was acting as a concerned citizen and was required to bring an application in Superior Court. His open political opposition to the respondent is an irrelevant factor in relation to costs.?

Justice Gilmore agreed in her decision that Mr. Hervey was aware he could be subject to costs as well as the fact Ms. Morris' fees are covered by insurance and should not be a factor in weighing the outcome. She also agreed that Mr. Hervey was ?aware not only that the application may well be outside the limitation, but that there was a possibility that no conflict of interest existed.?

?While I understand the applicant's submission with respect to this being litigation related to a matter of public interest, the argument may have been more convincing if the applicant had demonstrated less animosity towards the respondent,? said Justice Gilmore in her ruling. ?While I accept the applicant's argument that his political opposition to the mayor may have been an irrelevant factor in awarding costs, the political opposition in this case went far beyond an altruistic political stand.?

She also said, however, that costs must be ?proportional? to the result and knocked the \$111,295.96 down to \$45,000. Justice Gilmore said that although Mr. Hervey was aware of the cost factor, it is unlikely he would have expected to pay over \$100,000.

?I do not view this as a case for substantial indemnity costs, but rather a reasonable amount of costs in proportion to the above considerations,? she said. ?I do not agree that costs of the motion related to the scheduling should be awarded. Ultimately, a schedule was agreed to and the issue was resolved.?