

Analysis

[4] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.

[5] Mr. Martynenko as the successful party is presumptively entitled to costs.

[6] He seeks substantial indemnity costs on the basis of multiple communications that he made to the defendant regarding this motion and why the case law was not on the defendant’s side.

[7] I reject this argument.

[8] While the court has the discretion to award substantial indemnity costs, such costs are “rare and exceptional” and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: see *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.); and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

[9] Communications among counsel about the merits of the motion do not rise to this level.

[10] As such I award partial indemnity costs as claimed in the amount of \$13,592 payable within 15 days. This amount is fair and reasonable, the rates are fair and reasonable and the defendant should have reasonably expected that it would have to pay this amount given that this is approximately the same amount of costs that it set out in its Bill of Costs.

Papageorgiou J.

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