CITATION: HMK v. Temagami Barge Ltd. et. al., 2024 ONSC 7282
COURT FILE NO.: CV-09-4721
DATE: 31/12/2024

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: His Majesty the King in Right of Ontario as represented by the Minister of Natural Resources, Plaintiff

AND:

Temagami Barge Limited, The Estate of Raymond Joseph Delarosbel, Deceased by his Estate Trustee Patricia Delarosbel and Clifford Foster Lowery, Defendants

BEFORE: The Honourable Justice David Nadeau

COUNSEL: *E. Machado,* for the Plaintiff

C. R. Aiello, for the Defendants Temagami Barge Ltd. and Raymond Joseph Delarosbel

J. Madhany, for the Defendant Clifford Foster Lowery

HEARD: By written submissions.

ADDENDUM ON COSTS

[1] Pursuant to my Decision on Motion released on August 22, 2024, I have received and considered the Costs Submissions of Mr. Aiello dated September 12, 2024, and his Costs Outline dated September 6, 2024, the Costs Submissions of Ms. Machado dated September 26, 2024, as well as the Reply of Mr. Aiello dated October 1, 2024. On behalf of his client, as he did for my latest Addendum on Costs from November 24, 2023, Mr. Madhany chose not to file written submissions since the defendant Mr Lowery is not seeking costs from any party and no party is seeking costs from him either on this interim motion.

[2] Counsel for the defendant, Temagami Barge, submits that this Court should fix a partial indemnity costs award of $25,520.68 inclusive of fees, disbursements and taxes, payable by the plaintiff to Temagami Barge within 30 days. Counsel for the plaintiff submits that the Court should not order any costs for the motion or order that costs should be in the cause. In the alternative, it is submitted that costs should be reduced to $8,000 to account for the mixed results on the motion and the defendant's vague Costs Outline.

[3] I agree with the submission by Counsel for the plaintiff that, in assessing costs, the Court "is required to consider what is "fair and reasonable" having regard to what the losing party could have expected the costs to be": *Pack v. Cord Blood Bank of Canada Inc.*, 2023 ONSC 3227, at para. 11.

[4] This Court's exercise of discretion for costs determinations is founded in s. 131 of the *Court of Justice Act*:

> "the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."

[5] Costs awards are "quintessentially discretionary.": *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, at para. 344, relying on *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, at para. 126.

[6] Traditionally, the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences and to discourage unnecessary steps that unduly prolong the litigation: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, 2006 CanLII 35819, 82 O.R. (3d) 757 (C.A.), at para. 26.

[7] In the civil law context, the relevant factors in that exercise of discretion to fix costs is outlined in Rule 57.01(1) as follows:

> "**57.01(1)** Factors in discretion – In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
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> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,

> (i) improper, vexatious or unnecessary, or
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> (ii) taken through negligence, mistake or excessive caution;
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> (g) a party's denial of or refusal to admit anything that should have been admitted;
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> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
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> (i) commenced separated proceedings for claims that should have been made in one proceeding, or
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> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
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> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
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> (i) any other matter relevant to the question of costs."

[8] Absent special circumstances, costs follow the event. "It is worth repeating that a costs award does not have to be measured with exactitude; rather, it should reflect a fair and reasonable amount that should be paid by the unsuccessful parties.": *Butler v. Royal Victoria Hospital*, 2018 ONCA 409, at para. 18.

[9] In exercising discretion, the "overriding principle" in fixing costs is to fix an amount that is "fair and reasonable": *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24; see also, *Zesta Engineering Ltd. v. David Cloutier*, 2022 CanLII 25577 (Ont. C.A.), at para. 4; *Coldmatic Refrigeration of Canada Ltd. v Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.), at para. 8.

[10] As recently outlined in *Apotex Inc. v. Eli Lilly Canada Inc*., 2022 ONCA 587;

> **"59** The relevant principles to be applied in a court's exercise of its discretion to award costs under s. 131 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43* are well established. They include the myriad factors enumerated in rule 57.01(1) of the *Rules of Civil Procedure*, such as: the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, as well as "any other matter relevant to the question of costs". This is not a mechanical exercise or a rubber stamp.
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> **60** A proper costs assessment requires a court to undertake a critical examination of the relevant factors as applied to the costs claimed and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable": *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at para. 356, citing *Boucher v. Public Accountants Council (Ontario*) (2004), 71 O.R. (3d) 291 (C.A.), at para. 24. However, as this court recently reiterated in *Restoule*, at para. 357, referencing *Murano v. Bank of Montreal (1998),* 163 D.L.R. (4th)

> 21 (Ont. C.A.), at para. 100, "this overall sense of what is reasonable 'cannot be a properly informed one before the parts are critically examined"'.
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> **61** The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant: *Boucher*, at para. 26.
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> **62** While the reasonable expectation of the parties concerning the amount of a costs award is a relevant factor that informs the determination of what is fair and reasonable, it is not the only, determinative factor and cannot be allowed to overwhelm the analysis of what is objectively reasonable in the circumstances of the case. To hold otherwise would result in the means of the parties artificially inflating costs with the concomitant chilling effect on access to justice for less wealthy parties. As this court cautioned in *Boucher*, at para. 37: The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties."

[11] Fixing the appropriate costs award requires a two-part analysis. Firstly, I must undertake a critical analysis of the relevant factors in exercising my discretion including relative success or failure from the interim motion, Rule 57.01(1), and any other matter relevant to the question of costs claimed. Secondly, and only then, am I to "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable." And in this two-part analysis, the failure to consider and undertake a critical analysis of the relevant factors before "stepping back" is an error.

[12] Counsel for the plaintiff submits that the result of the motion was mixed, and that the potential prejudice of the refusals that were upheld outweighs the probative value of the questions that must be answered from my Decision on Motion. Therefore, the plaintiff suggests there should be no costs for the motion or costs should be in the cause.

[13] Alternatively, Counsel for the plaintiff submits that costs should be reduced due to the mixed results on the Motion and the defendant's vague Costs Outline, and as well that the more than $25,000.00 in partial indemnity costs sought by the defendant is also not fair or reasonable.

[14] In *Whitfield v. Whitfield*, 2016 ONCA 720, the Ontario Court of Appeal outlined the following;

> "[9] The failure to provide detailed references to steps taken in the litigation will in some circumstances affect the recovery of costs. There is no general principle, however, that a party will be denied his or her costs for failure to provide dockets. Rather, a party who does not provide enough information to explain the hours spent or the steps undertaken runs the risk that costs will not be allowed or will be reduced for lack of clarity and explanation."

[15] In *Seelster Farms Inc. v. Ontario*, 2017 ONSC 5895, Justice Emery of this Court stated the following in declining to make an order for costs when the costs outline provided insufficient detail:

> "**18** The amount the plaintiffs are seeking for costs on the motions to quash is not insignificant. In the absence of the required facts and further submissions supposed by those facts, I am unable to make determinations under the relevant factors set out in Rule 57.01, and whether costs should be awarded on a motion by motion basis under Rule 57.03 of if the circumstances call for a "distributive" costs order. All factors and the general principles that govern the awarding of costs must be considered for the court to decide what a fair and reasonable amount would be for one or more parties to pay to another. It is for these basic reasons that I am unable to make any decision regarding the plaintiffs' claim for costs on the written submissions filed by the parties.
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> **19** The costs of the two motions to quash are therefore reserved to the court when the motions for summary judgment are heard. This includes the costs of Ontario's motion to stay."

[16] Counsel for the plaintiff further submits that the amount of costs claimed lacks clarity and is unreasonable and excessive for the reasons as submitted. I note that there is not a specific breakdown of the 31.5 hours claimed to the fee items outlined in the Costs Outline, and I would have preferred such a delineation of these total hours claimed for my consideration. Also, I note that Counsel for the moving party defendant is seeking an hourly rate of $562.50 as a partial indemnity rate, which I calculate to be 75% of his $750.00 actual rate.

[17] The Ontario Court of Appeal in *Bondy-Rafael v. Potrebic*, 2019 ONCA 1026, indicated at paragraph 57:

> "[P]artial indemnity fees are not defined in terms of an exact percentage of full indemnity fees under the *Rules of Civil Procedure*. While representing a portion of full indemnity costs, that portion has never been defined with mathematical precision but generally amounts to a figure in the range of more than 50 percent but less than 100 percent. This is as it should be given the myriad factors that the court must consider in the exercise of its discretion in fixing costs."

[18] The Court of Appeal for Ontario's decision in *Whitfield v. Whitfield*, 2016 ONCA 720 is instructive in this regard as follows:

> "[22] We agree with the respondent's submission. Unless full indemnity costs are warranted, it would be an error in principle to grant an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial or full indemnity basis. The appellant's argument has been previously rejected by this court: see *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.), at para. 36; *Wasserman, Arsenault Ltd. v. Sone*, [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.), at para. 4; *790668 Ontario Inc. v. D'Andrea Management Inc.*, [2015] O.J. No. 4018, 2015 ONCA 557, 336 O.A.C. 383, at paras. 21-23.
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> [23] To order otherwise would remove the distinction between partial indemnity and substantial or full indemnity costs and overcompensate the appellant. Partial indemnity costs are simply that: partial and not full compensation for a party's costs. Substantial indemnity provides far greater compensation and full indemnity results in complete reimbursement for costs. As a result, absent applicable settlement offers, substantial and full indemnity costs are reserved for rare and exceptional cases."

[19] As I determined on November 24, 2023, I once again do not see this interim motion to be one of those rare and exceptional cases where substantial and full indemnity costs are justified, and I do not understand that Counsel for Temagami Barge is arguing for such an award since the claim is for a discounted partial indemnity rate from his actual rate. The *Whitfield* decision provides this guidance on the question of what amount of partial indemnity costs should be awarded:

> "[29] What discount should be applied is within the discretion of the court and not a matter of a precise mathematical calculation. As this court noted in *Wasserman*, at para. 5: The degree of indemnification intended by an award of partial indemnity has never been precisely defined. Indeed, a mechanical application of the same percentage discount in every case where costs are awarded on a partial indemnity scale would not be appropriate. In fixing costs, courts must exercise their discretion, with due consideration of the factors set out in rule 57.01(1), in order to achieve a just result in each case."

[20] I agree that a costs award should follow the overall outcome of a hearing rather than the proportion of issues on which a party succeeded or failed. I have also not been made aware of any offer to settle this interim motion made in writing. I have also considered the principle of indemnity including the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer, the amount of costs that an unsuccessful party could reasonably expect to pay in relation to this step in the proceeding, the complexity of the proceeding and the importance of the issues, the conduct of any party

that tended to shorten or to lengthen unnecessarily the duration of the proceedings, as well as a party's denial of or refusal to admit anything that should have been admitted.

[21] Having undertaken my critical analysis of the relevant factors here as applied to the costs claimed, and then stepping back and considering the result produced as well as the application of the principle of proportionality and questioning whether, in all these circumstances, the result is fair and reasonable, I have been satisfied to fix an award of costs for this interim motion in the amount of $12,500, all-inclusive of fees, disbursements and HST, to be payable by the plaintiff to the moving party defendant Temagami Barge within 30 days.

Date: December 31, 2024

The Honourable Justice David Nadeau