

**CITATION:** 2551965 Ontario Ltd. v. Warkentin, 2024 ONSC 6662  
**COURT FILE NO.:** CV-18-0016-000  
**DATE:** 2024-11-28

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** 2551965 Ontario Ltd. And Cabin Country Realty Ltd. v. Harold Warkentin

**HEARD:** October 29, 2024

**BEFORE:** Fitzpatrick J.

**COUNSEL:** Shana French and Chris West, for the Plaintiffs  
Howard Markowitz, for the Defendant

**Endorsement on Trial Costs**

[1] On September 4, 2024, the Court released its trial decision in the above noted matter, *2551965 Ontario Ltd v. Warkentin*, 2024 ONSC 4876. The trial decision outlines, in detail, the facts of the matter leading to the dismissal of both the claim and the counterclaim. The parties were invited to make costs submissions. Before the trial commenced, I had asked counsel to provide me with sealed envelopes containing their costs outline, together with copies of any r. 49 offers submitted. I did this on the theory that, in my experience, parties are much more reasonable about costs positions before they know the trial outcome.

[2] Despite the dismissal of both parties' claims, counsel for Mr. Warkentin, quite rightly in my view, conceded that his client should pay something towards the plaintiffs' costs in this matter. He suggested a net quantum of \$40,000.00.

[3] The plaintiffs submitted that a substantial indemnity award in the order of \$204,299, plus HST, plus disbursements of 12,857.12, inclusive of HST, was appropriate in the circumstances.

[4] Having heard counsels' submissions, reviewed their respective bills of costs, and considered the various r. 49 offers exchanged by both parties, I order that Harold Warkentin pay to 2551965 Ontario Ltd and Cabin Country Realty Inc. ("CC" or "the plaintiffs") the sum of \$80,657.12, inclusive of HST and disbursements, for the costs of the claim and defending the counterclaim. I say this for the following reasons.

[5] I agree with the plaintiffs' submissions that when this case reached trial, it was proceeding as a wrongful dismissal action. The order of the evidence at trial, with Mr. Warkentin testifying first, reflected the parties' acceptance of this practical approach to the litigation.

[6] The action commenced by CC in April 2018 sought, among other relief, to enjoin Mr. Warkentin's post-employment actions. This claim for relief was based on an alleged non-compete covenant, plus allegations that Mr. Warkentin had and was interfering with the contractual interests of the plaintiffs. On October 24, 2018, a consent order was issued by Newton J. containing nine specific paragraphs of injunctive-type relief, which essentially required Mr. Warkentin to stop working and promoting himself as a realtor in Northwestern Ontario, and to refrain from soliciting clients from CC until October 10, 2020.

[7] The pandemic intervened and this matter stayed dormant until 2022. Ultimately, the plaintiffs limited their claim for damages to a nominal amount, though they maintained a claim for punitive damages through to trial. Accordingly, as the matter reached trial, the amounts being

pursued by Mr. Warkentin's counterclaim exceeded the nominal amounts sought by the plaintiffs, and the claim for punitive damages.

[8] This matter was subject to several trial management conferences commencing in October 2022. At trial, the parties had an agreed statement of facts and an agreed document brief that greatly reduced trial time. I agree with the submission of counsel for the plaintiffs that this work was done primarily by counsel for the plaintiffs.

[9] The r. 49 compliant offers exchanged between the parties are significant in my decision to award costs payable by Mr. Warkentin. On October 19, 2023, Mr. Warkentin offered to settle for a net payment of \$280,000.00. The plaintiffs made two r. 49 compliant offers. The first on October 23, 2023, offered to pay Mr. Warkentin the sum of \$100,000.00, less deductions required by law, and inclusive of interest and costs. The offer provided that a portion of the net amount could be applied to Mr. Warkentin's reasonable legal fees. Acceptance of the offer was contingent on Mr. Warkentin signing of a full and final release. The offer was open until the commencement of trial. It was not withdrawn.

[10] A second offer was also made, dated January 15, 2024. It offered to pay Mr. Warkentin the sum of \$110,000.00, less deductions required by law, and inclusive of interest and costs. It went on to contain essentially the same terms as the October 2023 offer. It was also open until the commencement of trial and was never withdrawn.

[11] In my view, the plaintiffs' offer does not strictly fit within the provisions of r. 49.10. It was a global offer that failed to differentiate how the funds would be allocated between the

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plaintiffs offering to settle their claim, while at the same time settling the counterclaim. This may be a fine distinction to make, but I do not think I can strictly apply the results mandated by r. 49.10 in this situation. That said, the offer is a factor I can consider under r. 57.01, in an exercise of discretion for awarding costs. Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court that discretion. Had Mr. Warkentin accepted either of the plaintiffs' offers, he would have been much further ahead than he is currently, having unsuccessfully pursued his counterclaim at trial. I note that his bill of costs indicated partial indemnity costs of \$108,005.40 for his counsel, inclusive of HST, plus disbursements of \$3,998.58, also inclusive of HST.

[12] The plaintiffs seek costs for four lawyers and one student. In my view, at least up until trial, principles of proportionality, reasonableness, and fairness dictate that Mr. Warkentin only be responsible to pay the costs of one opposing counsel. At trial, there is no doubt that counsel for the plaintiffs were of assistance to both their clients and the court, in expediting the trial and having it proceed efficiently. In my view, Ms. French was lead counsel for the plaintiffs at trial. Coincidentally, her partial indemnity hourly rate of \$360/hr. for a 2002 call was the same as that of Mr. Markowitz, being a 2000 call. The hourly rate was reasonable for both counsel. I appreciate that fixing costs is more than a mathematical exercise of taking hours and applying them to an hourly rate. However, it is useful to assess the general reasonableness of the quantum of a particular claim.

[13] It appears from the bill of costs that the vast majority of the work for this file was put in post-discovery, following delivery of the first offer to settle in October 2023. I calculate that Ms. French expended approximately \$40,000.00 in time, on a partial indemnity basis, for the period

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from pretrial to trial. Mr. West, as plaintiff's co-counsel, recorded approximately \$20,000.00 in time for attendance at the trial.

[14] Success was divided in this matter, as both sides had their claims dismissed. That said, much of this could have been avoided had Mr. Warkentin accepted one of the reasonable offers put forward by the plaintiffs. I am persuaded that the plaintiffs, despite a lack of strict compliance with r. 49.10 in terms of success, did make a realistic and reasonable offer. The trial outcome for Mr. Warkentin indicated that it was unrealistic for him not to have accepted one of the plaintiffs' offers.

[15] In my view, a reasonable, proportionate, and fair quantum of partial indemnity costs for this matter, to be paid by Mr. Warkentin to the plaintiffs, is \$60,000.00 plus HST.

[16] While the accommodation portion of the disbursements was significantly higher for the plaintiffs, two lawyers were involved. Overall, I accept that the disbursements, as submitted, of \$12,857.12 inclusive of HST were reasonable and should be paid by Mr. Warkentin.

[17] Accordingly, I find that Harold Warkentin shall pay the plaintiffs, 2551965 Ontario Ltd. and Cabin Country Realty Ltd., a total sum of \$80,657.12 for costs, inclusive of HST and disbursements forthwith.

“original signed by”  
The Hon. Mr. Justice F.B. Fitzpatrick

November 28, 2024

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**ENDORSEMENT ON TRIAL COSTS**

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Fitzpatrick J.

**DATE:** November 28, 2024