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July 14, 2022

Losing an anti-SLAPP motion can be costly for a plaintiff

By Stephen Thiele

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The issue of costs is important for parties to take into consideration when litigating a case. Presumptively, winning parties are entitled to recover partial indemnity costs from a losing party. A costs award can be significant. Under anti-SLAPP law, the cost risks faced by a plaintiff are even higher because the presumptive costs award on a successful motion to dismiss a plaintiff's claim under anti-SLAPP law is full indemnity costs.

In [Volpe v. Wong-Tam, 2022 ONSC 4071 \(CanLII\)](#), the court dismissed the plaintiffs' defamation action against a group of politicians and a media defendant under [section 137.1 of the Courts of Justice Act](#) (the "CJA"). The politicians were subdivided into four separate groups and were represented respectively by their own lawyers. The media defendant was also represented by its own lawyers. Accordingly, five different sets of costs were sought against the plaintiffs and the total amount awarded was more than \$380,000.

[Section 137.1\(7\)](#) establishes the presumptive full indemnity costs award for a successful anti-SLAPP motion. As stated in [Levant v. DeMelle, 2022 ONCA 79](#), the reasons for the presumption are (i) to reduce the adverse impact on constitutional values of unmeritorious litigation, and (ii) to deter the commencement of SLAPP actions.

Although the presumption can be rebutted, the burden to do so rests with the unsuccessful plaintiff. In general, the court can assess multiple of factors to determine whether it should depart from the costs presumption contained under [section 137.1\(7\) of the CJA](#). Those factors include any determination made under [subsections 137.1\(4\)\(a\) and \(b\)](#), any findings about the motivation of the parties, and the manner in which the parties have conducted the proceedings.

The existence or non-existence of the traditional hallmarks of a SLAPP action is also a factor that a court must weigh.

As well, in [United Soils Management Ltd. v. Mohammed, 2019 ONCA 128](#), the court, at paragraph 42, described that despite the presumption a court must still “...undertake the same type of analysis that is required when fixing costs in any other context...The quantum must still be fair and reasonable for what was involved in the particular proceeding.”

In this case, the plaintiffs had sought to avoid the presumptive full indemnity costs award, contending that in the circumstances only partial indemnity costs should be awarded. The plaintiffs specifically challenged the costs sought by the defendants on the grounds that their claim did not bear the hallmarks of a traditional SLAPP action.

The traditional hallmarks of a SLAPP action are:

- a history of the plaintiff using litigation as a threat to silence critics;
- a financial or power imbalance that strongly favours the plaintiff;
- a punitive or retributory purpose animating the plaintiff's bringing of the claim; and
- minimal or nominal damages suffered by the plaintiff.

In the [Costs Reasons](#), the motion judge methodically considered many factors to reject the plaintiffs' argument that only partial indemnity costs should be awarded.

First, the court rejected the plaintiffs' argument in connection with the traditional hallmarks of a SLAPP action, noting that on the motion it was found that the plaintiffs had produced no evidence of actual monetary losses.

Second, the motion judge noted that there was no evidence of malice, intentional conduct or bad faith to support the serious claims made by the plaintiffs.

Third, although the plaintiff had met the substantial merits threshold of the section 137.1(4) test, the motion judge found that this alone was not enough to defeat the presumptive costs award.

Fourth, the factors under [section 57.01](#) of the [Rules of Civil Procedure](#) did not favour the reversal of the presumptive costs award. Fifth, the plaintiffs did not complain that the costs sought by the defendants were unreasonable, with the exception of the costs sought by one of the defendants, IL.

The plaintiffs contended that costs sought by IL were significantly higher than the costs sought by the other defendants, that the hours incurred by IL's lawyer were excessive and that the hourly rate charged by IL's lawyer (\$725 for senior counsel) was excessive.

The motion judge again rejected all of the plaintiffs' arguments.

The motion judge held that the costs sought by IL were within the range of costs sought in similar complex anti-SLAPP motions, that the hours spent by IL's lawyers were consistent with those worked by the lawyers representing the other defendants and that the hourly rate of IL's lawyers was within the 2005 Costs Bulletin, adjusted for inflation. Senior counsel for IL had been called to the Ontario Bar in 2001 and his rate, in general, was not unreasonable for a lawyer engaged in complex litigation.

The substantial indemnity costs award was



made in favour of the defendant, MR. MR had only sought substantial indemnity costs and was represented by lawyers on a *pro bono* basis. The motion judge noted that the fact MR was represented on *pro bono* basis did not preclude her from obtaining costs.

It has been determined that awarding costs to parties represented by *pro bono* counsel is justified because:

- it ensures that parties are not free to abuse the judicial system without the threat of a costs sanction; and
- it promotes access to justice by encouraging lawyers to take on deserving cases even if the client cannot afford to pay.
- (See [1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CanLII 35819 \(ON CA\)](#); [Raimondo v. Ontario Heritage Trust, 2017 ONSC 6121, aff'd 2018 ONCA 750 \(CanLII\)](#).)

This case once again provides a cautionary reminder to plaintiffs that they face potential exposure to a significant costs award when commencing an action that is tethered to an expression on a matter of public interest. Although many factors must be considered by a court when making a costs award, the presumptive full indemnity costs award contained in [section 137.1\(7\) of the CJA](#) will not necessarily be easily rebutted.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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