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$50,000 costs guideline for successful anti-SLAPP motion not applied again

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As we have written before, Canada's civil court system is "a loser pays" jurisdiction. In general, a party that loses a motion or at trial is required to pay the winning party's costs on a partial indemnity basis. While a court has authority to award the winning party higher costs on either a substantial indemnity or full indemnity basis, such awards are an exception to the general rule. However, under Ontario's anti-SLAPP legislation, a defendant who succeeds in obtaining a dismissal of the plaintiff's action is presumptively entitled to full indemnity costs. This has resulted in significant costs awards being sought and granted. Accordingly, in *Park Lawn Corp. v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 (**"*Park Lawn*"**), the appellate court established a guideline that regardless of the presumption, a costs award should not exceed $50,000.

In *Canadian Frontline Nurses v. Canadian Nurses Association*, 2023 ONSC 3529, the court did not follow this guideline and instead awarded substantial costs against the plaintiffs.

In this case, the defendants successfully brought a motion under section 137.1 of the *Courts of Justice Act* to dismiss the plaintiffs' defamation action. The action had arisen out of comments made by the defendants about the plaintiffs' positions and activities related to COVID-19 vaccination and masking policies. The plaintiffs were against mandatory vaccination and masking policies and had organized protests in front of hospitals. The defendants defended the mandatory policies implemented by government, were concerned about public health, and were critical of the positions taken by the plaintiffs.

One group of defendants, described as the "CNA Defendants", sought $410,335.15 in costs for their successful motion, while a second group of defendants, described as the "TNI Defendants" (or media defendants), sought $74,625.92 in costs. These costs were calculated on a full indemnity basis.

The defendants submitted that there was no evidentiary foundation to deviate from

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the statutory presumption of full indemnity costs and that the costs were fair and reasonable.

In contrast, the plaintiffs submitted that costs should only be awarded on a partial indemnity scale and that the costs award had to take into account an offer the plaintiffs had made to settle the motion.

One day prior to the delivery of the CNA defendants' motion materials, the plaintiffs had offered to settle the motion to have the action against them dismissed, with prejudice and without costs. The CNA defendants steadfastly wanted costs and therefore did not accept the offer. The court rejected the plaintiffs' contention that their offer to settle should be taken into account because it simply did not trigger any consequences under rule 49 of the *Rules of Civil Procedure*. The CNA Defendants had contended that the plaintiffs did not obtain as favourable a result as the terms of their offer and that the plaintiffs did not obtain a "judgment" within the meaning of rule 49.10.

The plaintiffs also argued that:

- the quantum of costs sought was excessive and disproportionate to the matters at issue;
- the action did not bear the traditional hallmarks of a SLAPP proceeding; and
- the guideline established in *Park Lawn* should not be exceeded in the circumstances.

With respect to the guideline established for a costs award, the defendants, among other things, argued that:

- the courts retained the discretion to make an award that exceeded the guideline amount;
- the motion was not tactical;
- the motion succeeded under the public interest weighing exercise; and
- the court was still required to consider the factors under rule 57.01 of the *Rules of Civil Procedure*.

In the result, the court noted that there were two Court of Appeal cases released after the *Park Lawn* decision which had awarded costs in excess of the guideline amount, and that the principles which should be applied by a lower court on successful section 137.1 motion remained unclear. Those two Court of Appeal cases are *Boyer v. Callidus Capital Corp.*, 2023 ONCA 311 and *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381.

The motion judge determined that under a section 137.1 motion, costs should a) be awarded on a full indemnity scale unless the scale was inappropriate, and b) in an amount that was fair, reasonable and appropriate in all the circumstances of the case.

The defendants were entitled to an award of costs in excess of $50,000 because the motions were not abusive, the case was factually and legally complex and the motions were argued and decided before *Park Lawn* was released. On the latter point, the plaintiffs' reasonable expectations with respect to costs could not have been influenced by *Park Lawn*.

However, the time spent on the matter by lawyers for the two groups of defendants was somewhat excessive and duplicative. Accordingly, the CNA Defendants were awarded costs in the amount of $250,000, all inclusive, while the TNI Defendants were awarded costs in the amount of $50,000, all inclusive.

This judgment demonstrates that in assessing the amount of costs to award for a successful section 137.1 motion, courts continue to struggle with the guideline amount established by *Park Lawn*. Recent Court of Appeal decisions have left lower courts confused in regard to the amount of costs that can be awarded to a successful defendant and the principles and factors that should be applied when determining

a costs award. Arguably, the proper approach should be to accept the legislative presumption as drafted by legislators and for judges to apply their discretion without being unduly restricted by an artificial guideline cap.

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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