

KEEPING CURRENT

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Court grants full indemnity costs following dismissal of frivolous and fabricated claim (*Kovacevic v. Bank of Montreal*)

By James Cook, Michael Lauricella, and Isabel Yoo

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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The Superior Court of Justice in Ontario has been faced with significant backlogs for some time, leading to delays in civil matters. A recent decision from the court sends a clear message that litigants who add to the backlog by bringing frivolous, unfounded, and untenable claims, and then delaying the adjudication of their claims, may face substantial cost consequences.

In *Kovacevic v. Bank of Montreal* (Toronto, Court File No. CV-23-00694948, not on CanLII), the applicant brought a notice of application against the respondent bank for enforcement of a judgment under the Ontario [Reciprocal Enforcement of Judgments Act](#). There was, however, no judgment to enforce. Instead, the application contained a notice of lien for damages of USD \$100,000,000 for the bank's alleged failure to honour an instrument purporting to be an international bill of exchange. The damages comprised of \$20,500,000 for failure to honour the instrument, "treble damages" of \$61,500,000, and costs of \$18,000,000.

As the court later found, the instrument that the applicant sought to deposit was a "completely fictitious letter of credit bearing a Canada postage stamp presumably to give it an air of credibility". The bank had refused to accept and process the instrument on the basis of numerous irregularities on its face. Upon the bank's refusal to accept it, the applicant served various notices of default and notarial certificates on the bank, insisting that the bank justify its refusal or else be deemed to have accepted his demands.

The applicant subsequently filed and served a notice of application in February 2023 and registered a lien against it in the amount of USD \$100,000,000 under the [Personal Property Security Act](#). In his notice of application, the applicant appended a financing statement as grounds for registering the lien after the bank's refusal to accept the purported instrument.

Thereafter, the applicant took no steps to move the matter forward until October

2023 when the bank's lawyers sought to strike the application.

In March 2024, the court established a timetable and set the hearing of the application for April 2025 with ample time for the applicant to retain legal counsel.

The applicant failed to comply with the court's timetable, neglected to file any materials in support of his application, and failed to confirm the hearing of the application. Meanwhile, the bank had prepared full materials in response.

On the initial hearing date, the court awarded \$6,000 in costs thrown away against the applicant and adjourned the matter to October 2025, peremptory on the applicant. The date was chosen based on the availability of the applicant's newly retained counsel.

A few days before the October hearing date, the applicant again sought an adjournment on the basis that his newly retained counsel was not available to attend. After a brief adjournment of a few days to allow the applicant's counsel to appear, the court dismissed the application as requested by the bank.

Upon dismissal of the application, the court awarded full indemnity costs of over \$33,000 against the applicant.

In making the significant costs award, the court noted that the entire application was based on a clearly fraudulent instrument. The notice of application itself was incomprehensible and untenable. The court also noted that the proceeding took several years because of the constant delays caused by the applicant. Even after the hearing date was set peremptory on the applicant, he still sought to adjourn it.

The court held that the costs award was necessary to deter frivolous claims:

The courts are overburdened enough with

legitimate claims that people have to wait far too long to resolve. One reason for that is the presence of frivolous claims such as this one. Completely unfounded frivolous claims ought to be deterred. The only way of doing that is to cost awards.

In cost submissions, the applicant complained about the number of lawyers representing the respondent bank, arguing that its costs were unnecessarily high. The court rejected this argument, finding that the bank legitimately incurred the fees sought over the 2.5 years since the application was commenced. Furthermore, the court noted that it would not consider adjusting the bank's fees for a claim that was "completely fabricated" and "utterly without legitimacy".

The applicant also argued that he was initially self-represented and should not be liable for the costs of a claim which he genuinely but incorrectly believed was legitimate. The court also rejected this argument, finding that the applicant appeared to have had the assistance of a number of lawyers throughout the proceeding, albeit each for a very short period of time. The court found that this presumably reflected the candid advice that these lawyers gave the applicant about the validity of his claim.

The court held that any departure from costs on a full indemnity scale would only increase the leverage of those who bring claims to extort unreasonable settlements. The sole responsibility of the bank's costs lay with the applicant.

The court's decision sends a strong message: litigants who pursue frivolous or fabricated claims not only burden the justice system but also expose themselves to serious financial consequences. Where a claim is found to be wholly without merit, the court may order the



claimant to pay the opposing party's full legal costs as a message of deterrence and accountability.

Representation by Gardiner Roberts LLP

The respondent bank was represented by James R. G. Cook and Michael Lauricella of Gardiner Roberts LLP. Mr. Cook is a partner, and Mr. Lauricella is an associate in the firm's Dispute Resolution group.

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