**Civil Procedure**
**Winter Term 2024**

**Lecture Notes No. 2**

## I. INTRODUCTION (cont'd)

### *Professionalism*

Lawyers are obligated to act competently and in the best interests of clients. For advocates, this means putting forward a client's case to the best of the lawyer's ability and using all available procedures and evidence. There are limits, however, imposed by the Law Society's *Rules of Professional Conduct*. Some organizations provide "best practices" guideline; for example, see the Advocates Society's publications on point and their *Principles of Civility and Professionalism for Advocates*.

**Groia v. Law Society of Upper Canada**
**2018 SCC 27 (S.C.C.)**

When and why can a lawyer be sanctioned professionally for violating the principles of civility?

This case is a cautionary tale. The lawyer acted zealously and alleged prosecutorial misconduct; the SCC reviewed discipline generally and stressed good faith and a proper evidential basis for making such allegations. Please read the case to understand the intersection between the adversarial principle and the Rules of Professional Conduct.

### *Fees*

**Fees** = charges for professional services performed under a contract.

The usual practice is **hourly fees**; in some areas, **contingency fees** (payable at a percentage of an award only in case of success) or **block fees** are used. Minimum fees may be charged. In some cases, lawyers work *pro bono* or their fees are paid by Legal Aid (on an hourly or block-fee basis) or are ordered by the Court to be paid by the Crown (rarely). A contract between a lawyer and a client is called a **retainer agreement**. Money paid 'on retainer' is held in trust and applied to the amount owing after **an account is rendered**.

A client can have a lawyer's account '**assessed**' under the *Solicitors Act*, s.3 by an 'Assessment Officer' within 30 days after the final account is rendered. The bill can be reduced where it is outside the retainer agreement or unreasonable based on the following factors:

1. The time expended by the solicitor;
2. The legal complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The client's expectation as to the amount of the fee.

## *Costs Ordered Against Counsel Personally*

**57.07(1) of the Rules:**

> **57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,**
>
> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
>
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> **(c) requiring the lawyer personally to pay the costs of any party.**
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
>
> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

**Standard Life Assurance Co. v Elliott**
**2007 CanLII 18579 (Ont. S.C.J.)**

Here the claim was made against an insurer and all of its former and present employees who dealt with the plaintiff's insurance claim for disability payments. The claim against the third parties was both unnecessary practically (the defendant admitted vicarious liability if the principal allegations were proved) and failed on legal grounds. The effect was to increase the defendant's costs which were sought on an elevated basis from the lawyer for the plaintiff *personally*.

**Molloy J.:**

10 In exercising discretion as to an appropriate costs award, it is relevant to take into account "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary": Rules of Civil Procedure, Rule 57.01(1)(e) and (f).

...

13 Counsel for Standard Life gave Mr. Masters several opportunities to drop the third party claim against the employees without the necessity of a motion, but he refused.

...

**15 As a result of the third party proceeding alone, Standard Life will have incurred nearly $40,000.00 in legal fees. This kind of tactical litigation is not conducive to the legitimate settlement of disputes in our judicial system. On the contrary, it is exactly the kind of conduct that makes litigation so prohibitively expensive that legitimate disputes cannot be litigated. It is appropriate in this kind of situation to discourage such conduct by imposing stiff costs consequences...**

...

26 In *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada held that costs ought not to have been awarded personally against the solicitor for the father in protracted child custody proceedings dealing with the extent to which the father could involve the children in his Jehovah's Witness religious activities during periods of access. The Supreme Court recognized that the proceedings had been lengthy and acrimonious. However, the Court held, at p. 284 that costs are compensatory and are not awarded for the purpose of punishing a barrister. McLachlin J, (writing for the majority on this point), stated p. 284:

> . . . **Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging that abuse and delay. It is as clear that the courts possess that jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. . . . Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an**

> **adverse order of costs may conflict with these fundamental duties of his or her calling.**
>
> 31 **Costs are meant to be compensatory. The likelihood of recovering the costs thrown away as against the defendant are remote. The only way to truly compensate the plaintiff insurer for its costs would be to make them payable by the solicitor.** Given my finding that Mr. Masters was the instigator of the action taken and that he took the steps he did for an improper purpose, as well as the fact that his general conduct of the litigation excessively drove up costs, it is in my view appropriate that he pay the costs personally.

**Best v. Ranking**
**2016 ONCA 492 (Ont. C.A.)**

The typical part of this case is that a litigant alleged a widespread conspiracy against him involving the judiciary, lawyers, the police, and others that opposed his claims. The less typical part is that costs of $84,000 were ordered to be paid by the plaintiff and his lawyer (personally), jointly and severally. The plaintiff already owed huge sums for costs in the same proceedings. The lawyer argued that other lawyers would be reluctant to provide forceful advocacy in weak cases if costs were ordered against him personally – the Court of Appeal would have none of it.

**Pardu J.:**

> **[54] The motion judge examined the entire course of the litigation in assessing the specific actions and conduct of counsel, as she was required to do. In particular, she focused on the vexatious or abusive nature of the proceeding. This is not a necessary element of an award of costs against counsel personally but is not unfamiliar in this context…**
>
> **[55] On appeal, Mr. Slansky argues that Action 2 was not abusive. It was against many different parties and for different causes of action. That issue has now been conclusively determined by the dismissal of Mr. Best's appeal from the decision striking Action 2 as an abuse of process. Action 2 made similar allegations of impropriety as had been voiced in the course of Action 1. The motion judge did not err in considering that Mr. Slansky incorporated into the pleading in Action 2 accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless.**
>
> [56] Finally, as this court indicated in *Galganov*, at paras. 23-25, deference is owed to a motion judge's decision as to whether a lawyer should pay costs personally:

> The determination as to costs is a matter within the discretion of the application judge. An appellate court may set aside a costs award if the application judge made an error in principle or if the costs award is plainly wrong.
>
> In *Rand Estate*, this court held that:
>
> The application judge who managed the proceedings was in a much better position than this court to make the necessary assessments underlying the findings of fact he eventually made. Those findings are, by their nature, somewhat subjective and the cold paper record cannot, in our view, capture all of the considerations that would be relevant to those findings. We defer to the [application] judge's findings unless they are clearly in error and clearly material to his ultimate determination.
> As a result, this court owes a high degree of deference to the application judge's holding…. [Citations omitted.]

[57] I see no basis to interfere with the motion judge's discretionary decision to order Mr. Slansky to pay some portion of the costs wasted.

[58] In the event leave to appeal a costs order against counsel personally is necessary, I would grant leave.

## *Introduction to the 'Costs Rules'*

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.
- Aim: compensation for the costs of litigation.
- 'Partial indemnity' is the norm (expect 60% of reasonable costs at best), 'substantial indemnity' (90% of reasonable costs) are exceptional and usually based on offers to settle, and 'full indemnity costs' are rare.
- ***These are discretionary awards and very hard to predict.***

**Courts of Justice Act, R.S.O. 1990, c.C.43**

> 131.(1) Subject to the provisions of an Act or rules of court, 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.

**See Rules 49 (Settlement Offers), 57 (Costs)**

**Plaintiff's Offer**

**49.10 (1) Where an offer to settle,**

**(a) is made by a plaintiff** at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,

**and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise**.

**Defendant's Offer**

**(2) Where an offer to settle,**

**(a) is made by a defendant** at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

**and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.**

...

57.01 (1) 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,

(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;

(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;

(a) the amount claimed and the amount recovered in the proceeding;
(b) the apportionment of liability;
(c) the complexity of the proceeding;
(d) the importance of the issues;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) whether any step in the proceeding was,
(i) improper, vexatious or unnecessary, or
(ii) taken through negligence, mistake or excessive caution;
(g) a party's denial of or refusal to admit anything that should have been admitted;
(h) whether it is appropriate to award any costs or more than one set of costs where a party,
(i) commenced separate proceedings for claims that should have been made in one proceeding, or
(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
(iii) any other matter relevant to the question of costs.

**Barlow v Citadel General Assurance Co.**
**2008 CanLII 3215 (Ont. S.C.J.)**

Here the plaintiff was awarded $100,000 in damages and sought $250,000 in costs; costs in the amount of $90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim).

Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

**Lalonde J.:**

4 **Counsel for the plaintiff seeks a $50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not**

**recover any fees or disbursement unless the plaintiff was successful in a settlement or at trial. He states that his client had no financial ability to retain his services.**

...

10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.

11 The plaintiff claimed a premium of $50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:

¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**

¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.

¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.

12 Weiler J.A. cancelled the $50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a $50,000.00 costs premium in this case.

**Clarington (Municipality) v. Blue Circle Canada Inc.**
**2009 ONCA 722 (Ont. C.A.)**

Epstein J.A. held:

> [30] The same principle was expanded upon in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), at p.23, where Robins J. A., speaking for the court, set out the restricted circumstances in which a higher costs scale is appropriate with reference to *Orkin* at para. 219.
>
> **An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:**
>
> **[S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement.**
>
> [31] The narrow grounds justifying a higher costs scale were further reinforced by Abella J.A. in *McBride Metal Fabricating Corp. v. H. & W. Sales Co.* (2002), 59 O.R. (3d) 97 where, at para. 39, she said:
>
> Apart from the operation of Rule 49.10 (introduced to promote settlement offers), only conduct of a reprehensible nature has been held to give rise to an award of solicitor-and-client costs. In the cases in which they were awarded there were **specific acts or a series of acts that clearly indicated an abuse of process, thus warranting costs as a form of chastisement.**
>
> …
>
> [45] Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex v. Egis Pharmaceuticals* substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation...particularly where a party has conducted itself improperly in the view of this court." For other examples of abuses of process leading to elevated costs, see *Dyer* at pp.184 - 85.
>
> [46] Here, there is no finding or evidence in the record of "harassment…by the pursuit of fruitless litigation". The settling defendants were entitled to advance their position; they were not required to settle. **In**

> **the end, the trial judge did not agree with their position but the settling defendants did nothing to abuse the process of the court.** In short, there was no wrongdoing on the part of the settling defendants that warranted a rebuke from the court.

*Clarington* is difficult in that the Court does not provide much insight into the level of fault that is required other than to repeat certain traditional characterizations of conduct (such as 'reprehensibility') that are not related to values, except for one: abuse of process. and the administration of justice is prejudiced by vexatious or oppressive conduct.

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**Costa v. Seneca College of Applied Arts and Technology**
**2023 ONCA 673 (Ont. C.A.)**

This is an interesting case that deals with the availability of costs to be ordered against an advocacy group litigating through a private individual, and brings into focus the use / abuse of the costs rules in respect of litigation that is said to be in the "public interest".

Here two students challenged the Covid-19 protocol instituted by Seneca College, particularly the requirement that students be fully vaccinated to take part in classes on campus and in person. They sought an injunction which was before the Court on a motion. The students argued that their individual programs required in-person instruction to complete the program, but that the students were unwilling to be vaccinated. The principal grounds advanced were constitutional; that is, that Seneca's policy violated the students' rights to freedom of conscience, life, liberty, security of the person, privacy and equality under Sections 2(a), 7, 8 and 15 of the *Charter*. The motion was dismissed; 2022 ONSC 5111 (Ont. S.C.J.). The matter then proceeded to the determination of costs. In its submissions, Seneca College argued that the students were impecunious but that their litigation was really brought by, and paid for, by an organization called the Judicial Centre for Constitutional Freedoms. Justice W.D. Black agreed (the decision is unreported):

> **[14] In this case, as Seneca points out, JCCF has "advertised it extensively on its website" and has "fundraised to support this case". In the latter regard, as confirmed by its financial statements, also filed with Seneca's materials, JCCF has gone from having assets of $133,271 as of 2014 to having raised donations upwards of $2.6 million in the last couple of years, and net assets as of 2020 of $1,742,314, almost $1.7 million of which was held as cash. In 2020, according to its income statement, it had an excess of revenue over expenses in that year of almost $500,00**0.
>
> **[15] In its materials, Seneca provides links to various pronouncements on the JCCF website relative to this case. A posting on August 24, 2021 is representative. It trumpets various tenets of what ultimately**

> **formed the applicants' case before me (many of which I rejected in my decision on the injunction motion). The post announces that:**
>
> **"The Justice Centre is preparing a lawsuit against Seneca on behalf of these students, and intends to aggressively defend their Charter rights. Seneca's policy is not only unconstitutional, but also not science or evidence-based..."**
>
> [16] It is apparent based on these materials that the JCCF actively and continuously promoted this case on its website, and inserted itself in the "cause" being litigated, rather than maintaining the posture of dispassionate advocate.
>
> [17] Seneca notes all of this in its costs submissions, and, as set out above, makes it clear that it seeks its costs from the well-funded JCCF rather than from the individual applicants.
>
> **JCCF Liable for Costs**
>
> **[18] In my view, that is the appropriate approach and, notwithstanding the JCCF's status as a charity and its stated goal of defending important constitutional rights, it is riding, in this case, the twin horses of advocate and interested party.**

[thereafter the Court considered the details of Seneca's "Bill of Costs", ultimately awarding Seneca costs on a partial indemnity basis in the amount of $110,000.00 plus disbursements of $46,461.99.]

**On appeal, Nordherimer J.A. held:**

> [14] The inherent jurisdiction to award costs against a non-party invokes a different test. As set out in *1318847 Ontario Ltd v. Laval Tool & Mould Ltd*., 2017 ONCA 184, 134 O.R. (3d) 641, at para. 66:
>
> In particular, apart from statutory jurisdiction, superior courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process.
>
> [15] It is on this basis that Seneca says that the motion judge was justified in awarding costs against JCCF.
>
> [16] The difficulty with that submission is that **the motion judge not only fails to make reference to the test for awarding costs under the court's inherent jurisdiction, he also does not make any finding that JCCF**

**engaged in an abuse of process. Rather, the motion judge appears to justify his award of costs against JCCF simply on the basis that it encouraged the case and then participated in it. As noted earlier, the motion judge appears to have found that it was problematic that JCCF inserted itself in the litigation and did not maintain "the posture of dispassionate advocate".**

**[17] It is not clear what the motion judge was intending to mean by his reference to JCCF not being a "dispassionate advocate". In any event, it is difficult to see how the actions taken by JCCF, and referred to by the motion judge, could amount to an abuse of process. Fund raising would not satisfy that requirement nor would promoting the case on a website. JCCF was entitled to let the public know about the case and it was also entitled to raise funds to defray the costs of the case. As the interveners correctly point out, to hold otherwise would have a very chilling effect on the work of public interest organizations.**

**[18] If there was evidence that JCCF had instigated the motion for an improper purpose, that would satisfy the abuse of process requirement. Similarly, if there was evidence that JCCF was in the position of a "maintainer", within the meaning of the tort of maintenance, that would also satisfy the abuse of process requirement: Laval Tool, at para. 75. However, there is insufficient evidence of either.**

[19] If JCCF had agreed to indemnify the students against any costs award, that could be a proper factor for the motion judge to consider in deciding to make an award of costs against the students as parties, such as occurred, for example, in Servatius v. Alberni School District No. 70, 2022 BCCA 421. However, that fact would still not have justified an award of costs directly against JCCF.

**[20] This raises a final issue. JCCF persistently refused to advise whether it was indemnifying the students against any costs award. In my view, JCCF was obliged to reveal that information and the motion judge ought to have required it to do so before making his costs award. I do note, on that point, that Seneca did not ask the motion judge to require JCCF to reveal that information, but the motion judge ought to have done it on his own. It was a relevant consideration in the proper disposition of costs in this type of proceeding. On that point, I agree with the general proposition set out in Servatius v. Alberni School District No. 70 (2022), 2022 BCCA 421, 2022 CarswellBC 3463, [2023] 10 W.W.R. 54 (B.C. C.A.), at para. 276:**

Therefore, where as here, a party is seeking to avoid the ordinary costs rule on the basis that the litigation is public interest litigation and on the basis that the named party cannot afford costs, it is necessary for the courts to know who is

truly financing that party's lawsuit and who is truly at risk for the potential costs award.

[21] The basis for the costs order is fundamentally flawed. The order must be set aside. I would return the issue of costs to the motion judge to be determined afresh in accordance with these reasons and so that any additional information relevant to the proper disposition of costs can be put before the motion judge.

[22] The appeal is allowed, the costs award is set aside, and the matter is remitted to the motion judge to determine whether a costs award is appropriate in this case and, if so, against whom it should be made. I would not make any order as to the costs of the appeal. While JCCF was successful, its conduct in this case significantly contributed to the confusion over costs. I would note, in any event, that there would not be any order as to the costs of the appeal for or against the interveners.