

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

R.G. ROBINSON, M.E. ROBINSON,
CHRISTINE BOURRE, JOHANNE
MARSHALL, BELAIR DIRECT

Plaintiffs

)
)
) Derek Nicholson, for the Plaintiffs
)
)
)

- and -

THE CORPORATION OF THE CITY OF
OTTAWA

Defendant

)
)
) Brian Parnega, for the Defendant
)
)
)

- and -

MARSHALL, MACKLIN, MONAGHAN
and ROB BISHOP

Third Parties

)
) Jennifer A. Roberts Logan, for the Third
) Parties
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)
)

) **HEARD:** By written submissions
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)
)

R. Smith J.

DECISION REGARDING COSTS

[1] The factors to be considered when fixing costs are set out in Rule 57 of the *Rules of Civil Procedure* and include in addition to success, the amount claimed and recovered, the complexity and importance of the matter, the conduct of any party which unduly lengthened the proceeding, whether any step was improper, vexatious or unnecessary, or taken through negligence mistake or excessive caution, a party's denial or refusal to admit anything, any offer to settle and the

scale of costs, hourly rate and time spent and the amount that a losing party would reasonably expect to pay.

Positions

[2] Counsel for the City seeks costs for the motion for summary judgment in this matter at the rate of 75% of his actual rate of \$275.00 in the amount of \$24,708.75, as well as an additional amount for S. Kelly in the amount of \$12,595.12, plus GST and disbursements inclusive of GST of \$1,305.25 for a total amount claimed of \$40,821.85.

[3] The Defendants, Marshall, Macklin, Monaghan and Rob Bishop (“Marshall Macklin”) does not take issue with the time spent, the delegation of work, or the actual rate charged, however, submits that a claim of 75% of the actual rate charged is excessive and submits that a partial indemnity rate of 55% of the actual fees invoiced is fair and reasonable. Marshall Macklin proposes that costs in the amount of \$21,542.86 including GST, plus disbursements of \$1,305.25 would be appropriate.

[4] The Plaintiffs seek costs in the amount of \$12,759.36, inclusive of GST and disbursements. Counsel for the Plaintiffs claims partial indemnity costs at the rate of 75% of his actual rate of \$325.00 per hour.

[5] Marshall Macklin submits that the appropriate amount of fees for the plaintiffs would be 55% of their actual rate or \$8,421.38 inclusive of GST, instead of \$14,582.50. The disbursements of \$1,669.15 are not contested.

Success

[6] In this case the plaintiffs and the City of Ottawa were successful as the summary motion to dismiss the claim against the defendants Marshall, Macklin, Monaghan and Robert Bishop was dismissed.

Amount Claimed and Recovered

[7] It is conceded that the amounts involved are substantial as this is a class proceeding and a substantial claim is made for damages for each household.

Complexity and Importance

[8] I find that the issues were complex and were important to the parties. The issue involved a novel point of law mainly whether an expert witness who is retained to provide an expert opinion by a plaintiff may be subsequently sued by the plaintiff. The issue of whether witness immunity and privilege applies to the expert witness who gives evidence by way of an expert report at a trial is an issue that is not settled in Canada for reasons outlined in more detail in the decision.

Scale of Costs, Hourly Rates and Time Spent

[9] Marshall Macklin does not contest the actual hourly rates or the time spent and the parties argue that the costs are to be based on a partial indemnity rate. I agree.

[10] The City submits that partial indemnity rates of 75% of the rate charged are appropriate in circumstances where the hourly rate charged for a lawyer of Mr. Parnega's experience is so low. The City relies on the Costs Decision of Hackland J. in the case of *Schouten v. Rideau (Township)* dated December 1, 2006 where costs on a partial indemnity scale were fixed at 75% of the actual rate invoiced for Mr. Parnega, the same counsel on this motion. In the *Schouten* case, Mr. Parnega charged an hourly rate of \$250.00 per hour. The rate charged by Mr. Parnega in the proceedings before me is \$275.00 per hour which is a \$25.00 per hour increase from the 2006 rates, which I find is a reasonable increase over the period of time.

[11] I note that Mr. Parnega was called in 1972. In comparing his fees with those of Mr. Nicholson who was called in 1980, Mr. Parnega's fees are \$50.00 per hour below the rate being charged by Mr. Nicholson who has less practice experience. Seventy-five percent (75%) of the actual rate of \$275.00 results in an hourly rate of \$206.25 as a partial indemnity rate. Substantial indemnity rates are to be equal to 1.5 times the partial indemnity rates. When \$206.25 is multiplied by 1.5 to obtain the substantial indemnity rate, the amount would be approximately \$309.28 per hour.

[12] To increase the rate from a substantial indemnity rate to full indemnity, the rate would be increased by approximately 10%. This results in an actual hourly rate of approximately \$340.00 per hour for Mr. Parnega. I find that these amounts are appropriate for counsel of Mr. Parnega's experience and competence in the area of civil litigation.

[13] I also agree with Hackland J.'s statement in *Schouten* that the percentages set out by Power J. in *Hanis v. University of Western Ontario*, 2006 CarswellOnt. 4439 at paragraph 46, are guidelines only and that when assessing the partial indemnity rates, all of the factors set out in section Rule 57.01 should be considered to arrive at the appropriate percentage to award for partial indemnity costs. I find that a partial indemnity rate of \$200.00-\$206.50 per hour for Mr. Parnega in the circumstances is a reasonable hourly rate.

The Plaintiffs' Costs

[14] The plaintiffs in this motion made very limited submissions and relied to a great degree on the City's position and as a result, I accept counsel for Marshall Macklin's submissions on the plaintiffs' costs. Marshall Macklin is to pay the plaintiffs' costs of \$8,020.38 plus GST of \$401.02 for a total of \$8,421.40 plus disbursements of \$1,669.15.

Amount the Unsuccessful Party Would Reasonably Expect to Pay

[15] Given Marshall Macklin's submissions that the time spent was reasonable and the hourly rates other than the percentage of the actual rate charged were reasonable, I find the amount the

unsuccessful party would reasonably be expected to pay as set out in *Boucher v. Public Accountants Council (Ontario)*, (2004) 71 O.R. (3d) 291 (C.A.) at least 55% of the fees claimed by the plaintiff and the City.

[16] Marshall Macklin submits that bringing a motion for summary judgment was an efficient and appropriate manner to address the question of witness immunity. It submits that it is appropriate to reserve the costs of this motion until the final determination of the issue and when the question of witness immunity is finally decided. However, Rule 57.03(1) requires a judge to fix costs for a contested motion unless a different order would be more just. Rule 57.03(1) states as follows:

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
(a) fix the costs of the motion and order them to be paid within 30 days; or

[17] In this case, the motion was brought under the current *Rules of Civil Procedure* and prior to the proposed amendments to Rule 20. The City and the plaintiffs were successful on the motion. Given that this motion was brought in a class proceeding, and does involve a novel point of law, and I have held that evidence was required to be heard in order to make a decision on a novel legal issue raised, I find that the costs should be payable in an ordinary course as set out in Rule 57.03(1).

Disposition

[18] As a result, Marshall Macklin is ordered to pay costs to the City in the amount of \$24,000 for B. Parnega and \$11,000 for S. Kelly for a total of \$35,000 plus GST plus disbursements of \$1,305.25. Marshall Macklin is also ordered to pay costs to the plaintiffs in the amount of \$8,421.40 plus disbursements of \$1,669.15.

R. Smith J.

Released: May 15, 2009

COURT FILE NO.: 02-CV-21270 &
02-CV-21270A
DATE: By Written Submissions

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