

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)

KIMBERLY ROGERS)

Applicant)

*Sean Dewart and
Charlene Wiseman
for the Applicant*

- and -)

THE ADMINISTRATOR OF)
ONTARIO WORKS FOR THE CITY)
OF GREATER SUDBURY and)
ATTORNEY GENERAL OF)
ONTARIO)

*Richard Stewart and Lisa Sand
for the Respondent
Attorney General of Ontario*

Respondents))

No one appeared for the
Administrator of Ontario Works

EPSTEIN J.:

SUPPLEMENTARY REASONS AS TO COSTS

[1] On May 25, 2001, I heard the applicant's motion for interim relief reinstating her as a recipient of 'Ontario Works' benefits (the "benefits") pending the determination of her constitutional challenge to the Regulations pursuant to which her benefits had been suspended. The motion raised the usual issues relevant to the test for an interlocutory injunction established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) in the context of relief sought that would have

the effect of suspending the operation of a law or at least exempting the applicant from its operation.

[2] In reasons released May 31, 2001, I granted an interlocutory order against the respondent, the Attorney General of Ontario. The effect of the order was to declare that the applicant was exempted from the application of the Regulations on an interim basis and to require the respondent to reinstate her benefits retroactively.

[3] This is the costs aftermath of that decision. In written and oral submissions as to costs, the applicant seeks an order awarding her costs on a party-and-party scale fixed in the amount of \$17,992.69 and payable forthwith. The respondent's position is that costs ought to be left to the judge hearing the application.

[4] This costs decision raises a number of issues including the extent to which the court's discretion in awarding costs may be influenced by policy considerations.

[5] The key issue in dispute is whether costs should be made payable forthwith. Counsel for the applicant, in arguing in favour of such an order, relies heavily on *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Gen. Div.) ("*Apotex*") and the well-settled principle that in interlocutory matters, costs ought to be paid forthwith. Mr. Dewart, counsel for the applicant, submits that an order requiring that costs be paid immediately would not only be in line with *Apotex* and the many decisions that have followed it, but also would promote the important policy objective of putting constitutional challenges within the reach of ordinary citizens. The law firm representing the applicant is doing so on what is known as a *pro bono* basis. *Pro bono* retainers, by definition, expose counsel who take them on to a financial sacrifice. The impact of that sacrifice can be lessened through cost awards made payable, where appropriate, during the course of the litigation. The result would be that more law firms would be able to commit to doing *pro bono* work and therefore that more litigants would be able to bring forth *Charter* challenges.

[6] The respondent submits that the majority of the case law stands for the proposition that the cost consequences of interlocutory injunctions should be left to the judge hearing the application for the simple reason that there has been no determination on the merits. Counsel also queries whether the fact

that the applicant's counsel is acting *pro bono* is relevant to the exercise of the court's discretion in determining costs.

Analysis

[7] In *Apotex, supra*, the plaintiff's attempt to obtain an interlocutory injunction restraining the defendant from prematurely entering the Canadian market for a certain drug, was unsuccessful. Justice Henry, in dealing with costs, held that the defendants should receive fixed costs to be paid forthwith by the plaintiff on a solicitor-and-client scale. The motions judge, in addition to finding that the claim for injunctive relief was without merit, went on to identify policy grounds for fixing costs and making them payable forthwith. Concerning the issue of judicial policy, Justice Henry said at p. 129 of *Apotex, supra*, that "[t]he object of the court [was] to require parties to consider carefully the necessity of bringing the motion in the first place, and to make the award of costs meaningful in view of the otherwise lengthy delays and added expense of having costs assessed in the usual way..." .

[8] Justice Henry did not agree with the plaintiff's argument that such an award amounts to a premature decision on the merits. In this regard he said that the motions judge "...is obliged to consider the facts and law as they are placed before him at this early stage. The issue on the motion is discrete - it is whether to grant an interlocutory injunction.[T]his is a discrete issue and one to which rule 57.03 can apply..." . See *Apotex, supra*, at p. 129.

[9] This approach was approved and followed by the Divisional Court in *Shimcor Investments Ltd. v. Toronto (City)* (1993), 12 O.R. (3d) 794 and specifically in relation to fixing costs in respect of the successful party in an interlocutory injunction in *930154 Ontario Inc. v. Onofri*, [1994] O.J. No. 2095 (Gen. Div.); *Staffing Consultants Inc. v. Personnel Etcetera Ltd.* (1990), 21 A.C.W.S. (3d) 941 (Ont. H.C.J.), and *Crabtree Meat Packers Co. (1989) Ltd. v. 120364 Ontario Ltd.* (1994), 50 A.C.W.S. (3d) 974 (Ont. Gen. Div.)

[10] The issue concerning whether to make costs payable forthwith in interlocutory injunctions has been examined and developed further in cases such as *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.*, [1994] O.J. No. 1087 (Gen. Div.) ("*Rogers*"). In *Rogers*, Justice Borins expressed the view that different considerations apply to motions for interlocutory injunctive relief as compared to motions for other kinds of interlocutory remedies. He went

further and distinguished between successful contested motions by a plaintiff for an interlocutory injunction depending on whether the result effectively put an end to the dispute or whether the result was just one step on the route to a trial. The pivotal point made by Justice Borins was that where it is clear that the granting of the interlocutory injunction will put an effective end to the proceedings, it is appropriate for the court to make a costs order which reflects this fact and to fix the amount of costs. However, in a case in which a trial is a virtual certainty, the court will consider the usual alternatives: plaintiff's costs in any event of the cause; plaintiff's costs in the cause; costs in the cause; or costs reserved to the trial judge.

[11] This important distinction was recognized and the cost consequences of that distinction adopted by Justice Lederman in *Ontario (Attorney General) v. Ballard Estate*, [1995] O.J. No. 3885 (Gen. Div.) and by Justice Sharpe in *Omega Digital Data Inc. v. Airos Technology Inc.*, [1997] O.J. No. 6288 (Gen. Div.).

[12] I support the distinction identified by Borins J. in *Rogers* that interlocutory injunctions ought to be treated differently when it comes to dealing with costs. In interlocutory motions that resolve disputes surrounding jurisdiction, production obligations, discovery parameters and matters of that nature, the decision determines a discrete issue. However, with interlocutory injunctions the moving party may ultimately lose at trial the very issue that is the subject matter of the interlocutory injunction since at the interlocutory stage balance of convenience and irreparable harm are taken into consideration. In such cases the merits of the moving party's position are not thoroughly canvassed and ultimately determined until trial. Accordingly, the application of the basic principle that costs should follow the event becomes somewhat problematic.

[13] It follows that, generally speaking, costs should be treated differently in motions for interlocutory injunctions depending on whether the granting of the injunction will put an effective end to the proceedings.

[14] In the case at bar, it cannot be said that the interlocutory injunction effectively put an end to this action.¹ However, I am of the view that such a finding does not foreclose the exercise of my discretion to make costs

¹ After I had made my decision concerning the cost award but prior to the release of this Supplementary Endorsement, I learned, through media reports, that Ms. Rogers had died. Accordingly, although this has not affected my decision, I do note that there will be no 'trial' in this matter.

payable forthwith. There still may be circumstances where such an award is appropriate. One such reason is to advance judicial policy.

[15] Traditionally, the fundamental principle of costs as between party and party was that the court awarded them as an indemnity to the person entitled to them. More recently, however, there has been a recognition that the principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs. Justice E. Macdonald in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.) held that it was no longer suitable to confine the decision to award costs to principles of indemnification. Indeed Justice Macdonald referred to the principle as being outdated since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexatious litigation, and to discourage unnecessary steps.

[16] Justice Osler gave consideration to the matter of costs in the context of *Charter* litigation in the case of *Canadian Newspapers v. A.-G. Can.* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.) ("*Canadian Newspapers*"). In awarding costs to the successful applicants, he observed at pp. 305-06 that "...it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden...".

[17] In *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 41 D.L.R. (4th) 86 at 126 (Ont. H.C.J.) ("*Re Lavigne*") after quoting the above passage from *Canadian Newspapers* Justice White described the policy consideration as follows: "In my view, it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means". He then added that "...this is a proper approach regardless of what financial support the applicant receives."

[18] The case of *Concerned residents or property owners in or about Tlell (Community) v. British Columbia (Minister of Transportation and Highways)*, [1994] B.C.J. No 3173 (S.C.) involved an application for costs arising from a petition pertaining to an issue of public interest in connection with a proposed subdivision. A question was raised with respect to the retainer agreement whereby the applicants' counsel had agreed to do the work at a *pro bono* rate. The court held that to require that costs be assessed on the basis of that *pro bono* retainer agreement would be to discourage similar agreements in other meritorious cases. Justice Mackenzie held that

such agreements should not be discouraged and ordered that the applicants should have their costs reasonably incurred.

[19] From this analysis, it can be seen that costs can be used as an instrument of policy and that making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective. How would an award of costs made payable forthwith following the granting of the interlocutory injunction in this case advance this policy?

[20] I start with two realities. First, so-called ordinary citizens generate a significant amount of *Charter* litigation. Secondly, *Charter* litigation tends to be long, complicated and expensive and therefore, financially prohibitive for most people. The result of these two realities is that to the extent that *Charter* litigation does go forward, applicants, particularly those such as Ms. Rogers who are experiencing financial hardship, are represented by lawyers acting *pro bono*. Such retainers obviously involve a financial sacrifice on the part of lawyers or law firms prepared to take on such work. This is so because the lawyers are not paid for their work as the file moves through the system. They are paid, if at all, by the 'other side' at the conclusion of the litigation. It may take years before those who accept *pro bono* retainers are reimbursed for their expenses and compensated for the time spent on the file. Accordingly, larger firms who can more easily "carry the file" accept more *pro bono* retainers. By limiting the type and number of firms who are able to assume this type of financial obligation, the public's access to counsel who will act for them in *Charter* challenges is similarly limited.

[21] Through granting, when appropriate, cost awards payable forthwith during the course of what is frequently protracted litigation, the financial burden assumed by the lawyers doing *pro bono* work is reduced. Orders of this nature would allow more lawyers to accept this kind of retainer thereby increasing the opportunity for people, such as Ms. Rogers, to have access to justice. As well, applicants who may suffer irreparable harm as a result of the application of a law that is the subject of a legitimate *Charter* challenge have increased opportunity to seek interlocutory relief since counsel acting for them have a chance of being paid promptly for the often very expensive process of preparing for and arguing a motion for an interlocutory injunction.

[22] Finally, I observe that historically, a party who was not liable to pay costs to his or her own solicitor could not have judgment to recover them

against the opposite party. There was nothing to be indemnified for. Costs not incurred could not be recovered. Thus where a solicitor was acting gratuitously or *pro bono*, the party, though successful, could not recover costs. See: *Simpson v. Local Bd. of Health of Belleville* (1917), 4 O.L.R. 320 (H.C.); *Ponton v. Winnipeg (City)* (1909), 41 S.C.R. 366. However, there are many cases such as *Fellowes, McNeil, supra*, in which Justice Macdonald awarded costs to the plaintiff, a law firm that was represented by one of its partners, that establish that this principle no longer applies. See also Justice Hawkins' comments in *Gin v. Somers*, [1996] O.J. No. 2625 (Gen. Div.) and those of Justice White in *Re Lavigne, supra*, as well as the provisions of the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26.

[23] Accordingly, I find that there is nothing preventing me from exercising my discretion and awarding costs in favour of the applicant made payable forthwith. How should I exercise that discretion?

[24] The applicant was entirely successful on the motion and costs ought to follow the event.

[25] As well, if I find that I should deal with the costs at this stage rather than leaving them to the judge hearing the application, there is really no issue as to my ability to fix the costs. As noted by Justice Morden in *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.) ("*Murano*"), the power to fix costs is conferred by s. 131(1) of the *Courts of Justice Act* and rule 57.01(3) of the *Rules of Civil Procedure*. Based on the considerations suggested by Morden J.A. in *Murano*, it is clear that I am in a position to fix costs. Counsel for the applicant has asked me to do so and, having regard to the submissions of the parties, I am satisfied that I am in a position to do procedural and substantive justice by fixing costs rather than by sending them to an assessment officer. The record before me allows me to do this as counsel for the applicant has provided copies of his dockets in support of the amount claimed. I find, therefore, that I am in a position adequately to scrutinize the quantum of costs requested by the applicant.

[26] The amount I have determined as being appropriate will be payable forthwith in accordance with the principle that has emerged of making the parties bear the costs of interlocutory proceedings along the way, and in order to promote access to justice. Counsel such as Mr. Dewart who take a leadership role in the legal community by providing such access should not, in any way, be deterred from doing so.

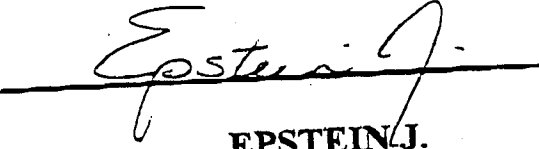
Conclusion

[27] I have considered the submissions concerning quantum in light of the principles established by Henry J. in *Apotex, supra*, with respect to fixing as opposed to assessing costs. I have taken into account such factors as the importance of what was in issue, the complexity of the matter and the amount of time spent as evidenced by the dockets provided.

[28] In my view, the applicant is entitled to her costs fixed in the amount of \$15,000 including fees and disbursements. Appropriate G.S.T. should be added to that amount. I have deducted a certain amount from that claimed to reflect some court attendances that ought not to have been necessary. Otherwise the amount claimed is appropriate particularly having regard to the complexity involved in researching and preparing a record and argument necessary to support the extraordinary relief that was ultimately granted.

[29] In the result, the Attorney General for Ontario will pay the applicant's costs fixed in the amount of \$15,000 plus appropriate G.S.T. These costs are payable forthwith.

[30] The applicant is also entitled to her costs of the cost submissions that I fix in the amount of \$250, also payable forthwith.


EPSTEIN J.

RELEASED: August 21, 2001