CITATION: Re Estate of Ruth Smith; Smith v. Rotstein, 2010 ONSC 4487
COURT FILE NO.: 01-4260/07
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SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE ESTATE OF RUTH DOROTHEA SMITH, deceased

RE: Lawrence Jerome Berk Smith, Executor and Trustee of the Estate of Ruth Dorothea Smith, Applicant

AND:

Nancy-Gay Rotstein, Marliyn Chapnik Smith, Cynthia Joy Smith, Ilyse Jan Smith, Natalie Jill Smith, Tremayne-Lloyd Smith and Claude R. Thomson, Trustee of the I. & R. Trust settled on November 7, 1991, Respondents

BEFORE: D. M. Brown J.

COUNSEL: R. Shekter and A. Rabinowitz, for the Moving Party, Lawrence Smith

I. Hull, S. Popovic-Montag and T. Sutton, for the Responding Party, Nancy-Gay Rotstein

HEARD: Pursuant to written submissions on costs.

SUPPLEMENTARY REASONS FOR DECISION - COSTS

I. Overview

[1] By reasons released April 15, 2010,[1] I granted the motion for partial summary judgment of Lawrence Smith dismissing the Amended Notice of Objection of his sister, Nancy-Gay Rotstein, in respect of the 1987 Will and the first two codicils made by their mother, Ruth

[1] *Re Estate of Ruth Smith: Smith v. Rotstein*, 2010 ONSC 2117

Dorothea Smith, who died in 2007, and I gave directions for the process to determine the validity of the Third and Fourth Codicils.

[2] The parties have now filed written submissions on costs. Lawrence Smith seeks costs of $840,718.14 on a full indemnity basis against Ms. Rotstein personally and not out of the estate of Ruth Smith. Ms. Rotstein does not dispute that Mr. Smith is entitled to his reasonable costs and that she, not the Estate, should pay them, but she submits that Mr. Smith should be awarded costs on a partial indemnity basis in the amount of $260,747.14, inclusive of G.S.T.

II. Procedural Background

[3] On December 3, 2007, less than a month after her mother had died, Ms. Rotstein filed a notice objecting to the issuance of a certificate of appointment to her brother, Lawrence Smith, without notice to her, on the grounds that her mother lacked testamentary capacity, did not have knowledge of nor approve the contents of her will, and had been subjected to undue influence. As well, Ms. Rotstein asserted that suspicious circumstances existed in respect of the apparent execution of the will.

[4] Mr. Smith filed an application for a certificate of appointment of estate trustee with a will of his mother's estate on December 17, 2007, listing the value of her estate assets at $1.695 million. In a subsequent affidavit Mr. Smith stated the net value of his mother's estate was $1.24 million. Ms. Rotstein then filed an amended notice of objection on December 20, 2007; her grounds of objection remained the same.

[5] Mr. Smith initiated this motion for summary judgment in October, 2008. In reasons given November 14, 2008, Himel J. permitted Mr. Smith's summary judgment motion to proceed before a contemplated motion by Ms. Rotstein under Rule 75.06 for an order giving directions for the conduct of her will challenge. Himel J. ordered that the hearing of the summary judgment motion be expedited and heard by the end of June, 2009. Ms. Rotstein sought leave to appeal to the Divisional Court from that order. She abandoned her motion for leave on March 3, 2009.

[6] Argument of the summary judgment motion proceeded before me on December 14, 15 and 17, 2009

III. The source of indemnity: the Estate of Ruth Smith or Nancy-Gay Rotstein personally?

[7] Ms. Rotstein submitted that Mr. Smith was entitled to an award of his reasonable costs as against her, not the Estate. That acknowledgement by the objector was appropriate in the circumstances of this case.

[8] As the Court of Appeal made clear in its decision in *McDougald Estate v. Gooderham*,[2] two fundamental principles now govern the award of costs in estate litigation. First, the starting point remains the general principles for determining the responsibility for costs applicable to all civil litigation, as expressed in Section 131 of the *Courts of Justice Act*, Rule 57 of the *Rules of Civil Procedure* and, since January 1, 2010, the principle of proportionality articulated in Rule 1.04(1.1). Second, public policy favours a departure from those general costs principles and the payment of the parties' litigation costs by the estate in two circumstances:

(i) where reasonable grounds existed upon which to question the execution of the will or the testator's capacity in making the will; or,

(ii) where the difficulties or ambiguities in the will that gave rise to the litigation were caused, in whole or part, by the testator.

In those two circumstances it is reasonable to look to the estate to bear the costs of resolving those questions because public policy requires courts only to give effect to valid wills that reflect the intention of competent testators.

[9] The discipline imposed on litigants by the "loser pays" principle in civil litigation was viewed by the Court of Appeal as appropriate in estate litigation:

> The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.[3]

[10] It is crucial to note that the two exceptions to the "loser pays" principle in estate litigation are not class exceptions – i.e. the exceptions do not apply to *all* will challenge cases or *all* will interpretation cases. On the contrary, as revealed by the four cases pointed to by the Court of Appeal in *McDougald Estate* as examples of the application of the modern approach to costs, responsibility for the costs of will interpretation or will validity litigation may well be placed on the shoulders of the individual litigants.[4] Only where the parties can demonstrate that *reasonable* grounds existed to question the execution of the will or the competency of the testator, or the presence of a *reasonable* dispute about the interpretation of a testamentary

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[2] (2005), 255 D.L.R. (4th) 435 (Ont. C.A.).
[3] *MacDougald Estate, supra*., para. 85.
[4] *Ibid*., paras. 81 to 84.

document, will the courts consider whether it is appropriate to award costs of the litigation from the estate, rather than apply the "loser pays" principle. The costs inquiry therefore will be specific to the facts and issues raised in each particular piece of estate litigation – no general class exceptions from the standard civil rules of costs exist for types of estate litigation.

[11] In the present case Ms. Rotstein challenged the validity of her mother's 1987 Will and codicils on the basis of lack of testamentary capacity, lack of knowledge and approval, and undue influence by her brother, the executor. Mr. Smith moved for partial summary judgment to dismiss those objections to the 1987 Will and the first two codicils. He succeeded on his motion.

[12] In respect of Ms. Rotstein's allegations of lack of testamentary capacity, I found as follows:

> [164] Given the evidence of Mr. Thomson, Q.C. who was present when the Will, First Codicil and Second Codicil were signed, and the admissions made by Mr. Rotstein during his cross-examination, no genuine issue for trial exists whatsoever regarding Ruth Smith's testamentary capacity in 1987, 1989 and 1991. No material facts are in dispute. Ruth Smith clearly possessed testamentary capacity.

[13] As to the objector's allegations that her mother did not know of and approve the contents of her 1987 Will and the first two codicils I concluded:

> [171] The uncontradicted evidence filed on this motion is that Ruth Smith knew and approved of the contents of her 1987 Will and the first two codicils. From the objector's written and oral submissions I gather her main argument is not that Ruth Smith lacked knowledge of her will's contents, but that neither Claude Thomson nor William Draimin provided Ruth Smith with the required independent legal advice on her testamentary instruments because both had acted for Isadore and Larry in various matters. In the absence of true independent legal, the objector argues, Ruth could not make a valid will.
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> [172] I do not understand the law to prevent a husband and wife from using the same lawyer to prepare their wills, especially wills such as the 1987 wills of Isadore and Ruth which provided for the other during his or her lifetime, and then both left any residue to their son. In fact, the current version of the Law Society of Upper Canada's *Rules of Professional Conduct* treats, as a joint retainer, the receipt of instructions from spouses to prepare one or more wills based on their shared understanding of what is to be in each will.
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> [173] Moreover, neither Claude Thomson nor William Draimin was a stranger to Ruth, placed before her only at the instance of her son. On the contrary, Mr. Thomson testified that he and his wife had socialized for years with the Smiths, and so did William Draimin's parents. Ruth had known Mr. Draimin since he was an infant. In sum, both lawyers were long time family advisors well-known to Ruth.

> [174] From the Notice she made at the time of her 1987 Will it is clear that Ruth Smith knew and understood that her will operated to exclude her daughter, Nancy-Gay, from her estate.
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> [175] In light of this evidence, I conclude that no genuine issue for trial exists as to whether Ruth Smith knew and approved of the contents of her 1987 Will and her first two codicils. She obviously did. Given the request of the moving party for only partial summary judgment, I offer no view with respect to the Third and Fourth Codicils.

[14] Finally, I determined that no genuine issue for trial existed in respect of the objector's allegation that Lawrence Smith had exercised undue influence over their mother when she executed her testamentary documents:

> [211] At issue on this motion for summary judgment is whether a genuine issue for trial exists regarding the 1987 Will, the 1989 First Codicil, and the 1991 Second Codicil. As noted above, inquiries into the relationship between the testatrix and others having a claim on her bounty both before and after the making of testamentary instruments may be relevant to the key question of whether the testatrix was coerced at the time of making those instruments. But, the weight of such evidence will depend upon its proximity to the time the testamentary instrument was made.http://www.canlii.org/en/on/onsc/doc/2010/2010onsc2117/2010onsc2117.html#_ftn116 On a motion under Old Rule 20 I am not permitted to weigh evidence; I am required, however, to assess the genuineness of an issue the responding party contends should go to trial. To do so, I can consider whether the proffered evidence is capable of supporting the inference the responding party contends should be drawn from it. Here, Ms. Rotstein founds her claim of undue influence in respect of the 1987, 1989 and 1991 testamentary instruments in part on events which occurred in 1976, some eleven years before the 1987 Will was executed. In my respectful conclusion, no air of reality attaches to those claims. The evidence she has pointed to is not capable of supporting the inferences she has put forward. Her claims do not give rise to a genuine issue for trial. The assertion, "once an undue-influencer, always an undue-influencer", while evocative, is, with respect to the allegations concerning events in 1976, just mere assertion, without any evidentiary foundation.
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> [297] I conclude that no air of reality surrounds Ms. Rotstien's claim that her brother exerted undue influence over their mother when she made her 1987 Will and the first two codicils, or during the last nine years of her life. First, Ruth Smith, through the Notice accompanying her 1987 Will, as well as the numerous pieces of correspondence, diary entries and affidavits that I have reproduced at great length, clearly explained why she had excluded her daughter from her estate, save for two pieces of jewellery. Ruth's decision to exclude Nancy-Gay originated in the mid-1970's and continued until her death. Ruth had perceived that her daughter had done great wrongs to her father and mother, including withdrawing herself and her children from the lives of her parents. As

a result, Ruth Smith excluded Nancy-Gay from a share in her estate. The record is clear, unequivocal and overwhelming – Nancy-Gay's exclusion from her mother's will resulted from Nancy-Gay's own conduct. No one else is to blame. The exclusion had nothing to do with Larry's conduct. Based on my "hard look" at the evidence, no evidentiary basis exists for any suggestion to the contrary.

[298] Second, Isadore Smith was alive and living with Ruth when she made her 1987 Will, First Codicil and Second Codicil, a difficult obstacle, one would have imagined, to a son's efforts to coerce his mother. Ruth and Isadore's 1987 Wills first provided for the survivor of the two of them during his or her lifetime. Their trustees were given the power to encroach on capital to support the survivor, hardly a provision for the advantage of Larry, the sole residuary beneficiary.

[299] Third, the undisputed facts about Ruth's last nine years of life reveal that Larry's involvement in her changes of residence, banking, hiring of care give-givers, dealing with doctors, and ultimately admitting Ruth to the Baycrest Centre, had nothing to do with a son "controlling" his mother's affairs in some coercive way, but everything to do with a son helping out his mother during the last phase of her life. Ruth Smith's health declined during the last eight or so years of her life. As often happens, a fall seemed to signal the start of the process. The evidence shows that Ruth maintained some independence until 2003, and then became depressed following the death of her boyfriend. Even earlier than that she had begun to require some physical assistance, as many elderly parents do. What was Larry Smith's explanation for providing and arranging that assistance? "I was her son. Somebody had to look after her and there was no one else."

[300] A mother was aging; she required assistance; her son provided it. What I see in the record before me is undisputed evidence that during Ruth's last eight years a son helped his mother to enjoy the final stages of her life with dignity. I see nothing in that conduct that could permit a court to conclude that the son was exercising undue influence over the mind of his mother. All I see in the record is a son performing a child's duty to an aging, and then dying, parent.

[301] As to the various pieces of litigation, all I see in the record after giving it a "hard look" is a family incapable, for whatever reason, of resolving its internal differences in a reasonable way. I see no hand of undue influence or coercion in such litigation.

[302] Finally, dealing with the property transfers, Larry Smith provided explanations for each transaction. Probate-proofing drove the Palace Pier, Avenue Road and Vaughan Road transactions. Both Mr. Thomson and Mr. Draimin observed that the Smiths, particularly Isadore and Ruth, were tax-driven people. None of those transactions prejudiced Ruth – she lived in luxurious condominiums until her health prevented otherwise, and she continued to receive the benefit of the net after-tax income from Vaughan Road. Ruth lived in the style to which she had become accustomed until her final days. Further, the effects of the joint tenancy transactions were completely in line with Ruth's selection of Larry as her sole residuary beneficiary.

> [303] The Main Street transaction resulted from the Smith family's desire to extract themselves from another branch of the family. Ruth's income did not suffer. On the contrary, Mr. Rotstein saw benefit in the income-stabilization effect of that transaction.
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> [304] I conclude that the evidence adduced before me on this motion in respect of Larry's conduct during the last nine years of his mother's life is not capable of giving rise to a claim that he unduly influenced his mother during that period of time. As to Ms. Rotstein's effort to tie that period of time back to the time Ruth made her 1987 Will and first two codicils, no air of reality surrounds that claims.
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> [305] Two final comments. First, I would have thought it was apparent that the two themes pressed by Ms. Rotstein on this motion – the prospect for a reconciliation with her mother that would result in a will change, and the effort to push back the time of Ruth's mental infirmity to the period when testamentary instruments were made – were mutually exclusive and worked to undercut each other. Second, Ms. Rotstein's position that if the 1987-based testamentary instruments were held to be invalid, then she would attempt to strike down every prior will until she came to one where her mother treated her equally with her brother, spoke volumes about the lack of "genuineness" of the claims advanced by Nancy-Gay Rotstein in this proceeding.
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> [306] For these reasons, I conclude that no genuine issue for trial exists in respect of the claim by Nancy-Gay Rotstein that her brother unduly influenced their mother when she made her 1987 Will and its first and second codicils.

[15] Those determinations on the issues in dispute clearly indicated that Ms. Rotstein had failed to present any *reasonable* grounds upon which to question the validity of the 1987 Will and the first two codicils. As a result, no basis existed to impose the responsibility for the costs of her will challenge on the Estate. Given those circumstances, Ms. Rotstein's acknowledgement that an award of costs should be made against her personally was appropriate.

IV. The appropriate scale of indemnity

[16] Mr. Smith seeks an award of costs on a full indemnity basis; Ms. Rotstein contends that an award is merited only on a partial indemnity scale.

A. General principles

[17] Rule 1.03(1) of the *Rules of Civil Procedure* defines partial indemnity costs as those determined in accordance with Part I of Tariff A of the Rules. No grid exists any longer for the fixing of partial indemnity costs, so such costs are determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in subrule 57.01(1). The rule goes on to define substantial indemnity costs as those awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A. The Rules do not contain a definition of full indemnity costs but, as put by the Court of Appeal in its recent decision in

Davies v. Clarington (Municipality), the term "is generally considered to be complete reimbursement of all amounts a client has had to pay to his or her lawyer in relation to the litigation". [5]

[18] In the *Davies* case the Court of Appeal identified the circumstances when elevated – i.e. substantial or full indemnity – costs may be awarded by a court:

> 28 The first issue is whether the trial judge erred in relying on the February 2005 offer as justification for an elevated costs award. This court, following the principle established by the Supreme Court, has repeatedly said that elevated costs are warranted in only two circumstances. The first involves the operation of an offer to settle under rule 49.10, where substantial indemnity costs are explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.
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> 40 In summary, while fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under rules 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made. As Austin J.A. established in *Scapillati*, *Strasser* should be interpreted to fit within this framework - as a case where the trial judge implicitly found such egregious behaviour, deserving of sanction.

B. Mr. Smith's Offer to Settle

B.1 The contents of the Offer to Settle

[19] Mr. Smith filed an application for a certificate of appointment of estate trustee with a will of his mother's estate on December 17, 2007. On February 20, 2008, he served the objector with an offer to settle. In October, 2008, Mr. Smith brought this motion for summary judgment.

[20] The key terms of Mr. Smith's Offer to Settle were as follows: (i) his sister would withdraw her objections to the application, consent to a dismissal of the will challenge, and consent to an order allowing the issuance of a certificate of appointment to Mr. Smith; (ii) his sister would execute a full and final release of any claims which could have been raised in the proceeding; and, (iii) in addition to the two pieces of jewellery described in paragraphs I-3A.(i) and (ii) of Ruth Smith's Second Codicil, Ms. Rotstein would also receive a ladies platinum

[5] (2009), 100 O.R. (3d) 66 (C.A.), para. 15.

engagement ring appraised at $88,000. Paragraph 6 of the Offer provided that it expired "immediately after the commencement of the hearing of the within proceeding, unless withdrawn earlier either orally or in writing."

[21] There is no dispute that the Offer remained open for acceptance until the commencement of the hearing of the motion for summary judgment.

B.2 Does the Offer meet the requirements of Rule 49?

[22] Under the Rule 49 offer to settle regime, if a party to a proceeding makes an offer that meets the formal requirements of the rule and its offer is not accepted by the other party, certain cost consequences may be triggered depending upon the result of the proceeding as measured against the terms of the offer.

[23] Ms. Rotstein submitted that Rule 49 does not apply to this proceeding because estates proceedings are applications under Rules 74 and 75, whereas Rule 49 uses the language of actions in describing offers by plaintiffs and defendants. That submission is not correct. Rule 49 applies to applications, as Rule 49.01 makes clear.[6] It also applies to motions.[7]

[24] As well, Rule 49 applies to estates proceedings. In *Beaurone v. Beaurone*,[8] McDermid J. found "no incompatibility in applying r. 49" to will challenge proceedings. That observation was noted by the Court of Appeal in *McDougald Estate*,[9] and the cost consequences of a Rule 49 offer have been applied in other will challenge proceedings: see, *Duschl (Attorney of) v. Duschl Estate*.[10]

[25] Mr. Smith's Offer met the formal requirements of Rule 49: it was a compromise, in writing, served on the other party at least seven days before the commencement of the hearing, was not withdrawn prior to the commencement of the hearing, and remained open for acceptance until immediately after the commencement of the hearing.

[26] The issue then becomes whether Mr. Smith, as the applicant/moving party, obtained "a judgment as or more favourable that the terms of the offer to settle". I conclude that he did not. While it is open to an offering party to serve an offer to settle "any one or more of the claims in the proceeding", Mr. Smith's Offer was not a partial one. Instead, he offered to settle the entire

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[6] Rule 49.01: "In rules 49.02 to 49.14, "defendant" includes a respondent; "plaintiff" includes an applicant."
[7] Rule 49.02(1): "Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications."
[8] [1997] O.J. No. 1481 (Gen. Div.), para. 6.
[9] *McDougald Estate, supra*., para. 82.
[10] [2009] O.J. No. 292 (S.C.J.), para. 24.

application for a certificate of appointment of estate trustee – i.e. his application for a certificate of appointment in respect of the 1987 Will and its four codicils. Had Ms. Rotstein accepted the Offer, a certificate of appointment would have issued in favour of Mr. Smith in respect of the 1987 Will and each of the four codicils.

[27] Mr. Smith ultimately did not seek summary judgment in respect of all the codicils. Prior to the hearing Mr. Smith's counsel advised that Mr. Smith would seek only partial summary judgment in respect of the 1987 Will and its first two codicils. That was the basis on which the motion was argued, and that was the judgment Mr. Smith obtained. Mr. Smith was prepared to deal separately with the validity of the Third and Fourth Codicils after the disposition of his motion for partial summary judgment. Simply put, the partial summary judgment Mr. Smith obtained was not as favourable as his Offer which, if accepted, would have resulted in the issuance of a certificate of appointment to him for the will and all its codicils.

[28] Although the Estates Registrar has advised me that a certificate of appointment was issued to Mr. Smith in respect of the will and all four codicils, its issuance resulted from directions I gave in my April Reasons for the further conduct of the proceeding, not from the scope of the order for summary judgment obtained by Mr. Smith. Accordingly, I conclude that the result of the motion for partial summary judgment did not trigger the cost consequences specified in Rule 49.10(1), and that Mr. Smith is not entitled to substantial indemnity costs by reason of that rule.

C. The conduct of the objector

[29] In *Davies v. Clarington (Municipality)* the Court of Appeal stated that "elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made".[11] When assessing the nature of a party's conduct in litigation, a court must keep in mind that under our system of litigation a defendant is entitled to put the plaintiff to the proof, and there is no obligation to settle an action, although Rule 49 provides significant incentives to do so.[12] So, "the thrust and parry of the adversary system does not warrant sanction", even if litigation turns out to have been misguided. However, "malicious counter-productive conduct" or the "harassment of another party by the pursuit of fruitless litigation" may merit sanction.[13]

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[11] *Davies, supra.*, at para. 40.
[12] Per Dubin J.A., in *Foulis v. Robinson* (1978), 21 O.R. (2d) 769, at p. 776.
[13] *Davies, supra*., para. 45.

[30] Cases referred to by the moving party disclosed that courts have awarded elevated, full indemnity costs when: (i) one party was an innocent party to the proceeding and the court concluded that she should not experience any loss as a result of the conduct and actions of the defendant which resulted in the litigation;[14] (ii) one party made baseless allegations of wrongdoing[15] or meritless claims of fraud, deceit, and dishonesty based on pure speculation against the other;[16] or, (iii) it was clear shortly after the event in question that the plaintiff was blameless, but was required to proceed to trial because of disputes amongst the defendants about their share of liability.[17]

[31] Was the conduct of Ms. Rotstein in pursuing this will challenge litigation "reprehensible" as that term is used in the context of determining responsibility for costs? Let me review several factors relevant to answering that question.

C.1 "Hard-fought" estates litigation

[32] First, this litigation was hard-fought by both sides. Each party hired a team of skilled litigators. It was apparent from the volume and the quality of materials placed before the court that each side had engaged in extensive and meticulous preparation, leaving no stone – factual or legal – unturned. But, engaging in hard-fought litigation does not, in and of itself, attract an award of elevated costs, although it doubtless will result in a very robust award of partial indemnity costs.

[33] However, more was involved in this proceeding than simply a hard-fought estates case. It is important to recall the context of this proceeding. Ruth Smith named her son, Lawrence Smith, the applicant, as executor of her estate. Where probate is required to administer an estate, the named estate trustee must apply for a certificate of appointment of estate trustee in order to prove the will and discharge his duties to the estate's beneficiaries and creditors. Our *Rules of Civil Procedure* entitle a person who appears to have a financial interest in an estate to file with the local registrar a request that she be given notice of the commencement of any application for the issuance of a certificate: Rule 74.03(1). Ms. Rotstein filed such a request in this case. When Mr. Smith filed his application for a certificate of appointment and served the requisite notice of application, Ms. Rotstein then filed a Notice of Objection to the issuance of a certificate.

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[14] *Wigle v. Vanderkruk*, 2005 CarswellOnt 4014 (S.C.J.), at para. 10, quoting with approval *Noel v. Page*, [1995] O.J. No. 2441 (Gen. Div.), at page 15.
[15] *Willmot Estate v. Willmot*, [2007] O.J. No. 2574 (S.C.J.).
[16] *Apotex v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Gen. Div.); (1991), 4 O.R. (3d) 321 (Gen. Div.).
[17] *Dube v. Penlon Ltd.* (1992), 10 O.R. (3d) 190 (Gen. Div.), at paras. 7 and 8.

[34] In her Cost Submissions Ms. Rotstein submitted that a Notice of Objection "is effectively a request for information and a step to ensure that nothing happens to the estate without notice…It is not an aggressive or necessarily adversarial step…The first truly adversarial and aggressive step taken in relation to Mrs. Smith's will was not the Notice of Objection. It was Mr. Smith's decision to serve the summary judgment motion in October 2008."[18] Let me deal with this submission at two levels.

[35] First, in terms of the process for applying for probate under the *Rules of Civil Procedure*, it is true that filing a Request for Notice of Commencement of Proceedings pursuant to Rule 74.03(1) simply constitutes a request for information about the start of a probate application. However, once an application for a certificate of appointment is filed and the interested person files a Rule 75.03(1) Notice of Objection, as Ms. Rotstein did on December 20, 2007, one is no longer dealing with an informational request, as suggested by the objector. The whole process described in Rule 75.03 is designed to move the application forward by having either the applicant or objector move for an order giving directions for the conduct of what has become a contentious estate proceeding.

[36] Second, Ms. Rotstein's submission about the benign intent of her notice of objection bears no relation to the submissions actually made on her behalf at the hearing. Let me repeat part of what I wrote in paragraph 305 of my April Reasons:

> Second, Ms. Rotstein's position that if the 1987-based testamentary instruments were held to be invalid, then she would attempt to strike down every prior will until she came to one where her mother treated her equally with her brother, spoke volumes about the lack of "genuineness" of the claims advanced by Nancy-Gay Rotstein in this proceeding.

[37] Given Ms. Rotstein's notice of objection, it then fell upon Mr. Smith, as the propounder of Ruth Smith's will, to proceed to prove the will. That is to say, in order to move forward with the administration of his mother's estate on behalf of her creditors and beneficiaries, Mr. Smith had no choice but to pursue litigation against the objections raised by his sister, the mandatory mediation process not being resorted to in this case. Mr. Smith elected to proceed to prove his mother's will by bringing his motion for partial summary judgment dismissing his sister's objections.

[38] In her Cost Submissions Ms. Rotstein argued that there was no urgency to probate the will: "There was no evidence [before Himel J.] that any of the beneficiaries required their bequests on an expedited basis. There was no evidence that there was a risk that the assets in the

[18] Objector's Cost Submissions, paras. 10 and 12.

estate would waste away or would diminish in value."[19] This submission does not reflect well on the attitude Ms. Rotstein brought to this proceeding. Contrary to the thrust of her submission, it is well-established that once an executor accepts an appointment, he must exercise the powers bestowed with diligence and must not unreasonably delay in getting in the assets and settling the affairs of the estate. [20]

[39] Ms. Rotstein implied in her submissions that had her brother refrained from bringing his motion for summary judgment and instead taken an "open book approach" allowing Ms. Rotstein "access to legal, financial and medical records to allow her to satisfy herself that her mother's testamentary decisions were her own", then, even if a will challenge followed, the record would likely have been narrowed.[21] I give absolutely no credence whatsoever to this submission; it stands diametrically opposed to the way Ms. Rotstein in fact conducted her challenge to the Will. More specifically, as I commented in my April Reasons, the notice of objection filed by Ms. Smith consisted of boilerplate allegations lacking any factual particularity. While such a form of notice is commonly used, the consequence of such a bald notice is that the objector puts in play a host of issues which may, or may not, merit scrutiny. In this case Ms. Rotstein threw in every possible issue except the kitchen sink, so to speak, challenging the validity of her mother's testamentary instruments on every ground, save due execution. As the proceeding unfolded, instead of adducing her personal knowledge of the issues in dispute, she refused to give evidence. Rather, she put forward her husband, Max Rotstein, as her evidentiary spokesman. Even then, as I noted in paragraph 83 of my April Reasons, objections taken by her counsel during the course of Mr. Rotstein's cross-examination blocked efforts by the applicant to obtain information about Ms. Rotstein's knowledge of the issues.

[40] Mr. Rotstein could not offer any personal knowledge about the circumstances surrounding the preparation or execution of the testamentary instruments, or Ruth Smith's life at those times, because Ms. Rotstein and her husband had removed themselves from the lives of Ruth and Isadore Smith and severed contact between her family and theirs. Nor did Ms. Rotstein adduce any evidence from family friends or others that called into question Ruth Smith's capacity to make her testamentary instruments.

[41] Having put in issue Ruth Smith's testamentary capacity, it was surprising to see that when Ms. Rotstein's husband was cross-examined on the issue of Ruth Smith's testamentary capacity, he he admitted, on several occasions, that Ruth Smith possessed testamentary capacity!

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[19] Objector's Cost Submissions, para. 11.
[20] James MacKenzie, *Feeney's Canadian Law of Wills, Fourth Edition* (Toronto: LexisNexis, 2000), §§8.6 and 8.17.
[21] Objector's Cost Submissions, para. 11.

Notwithstanding her husband's clear admissions during cross-examination and the lack of any other evidence calling into question her mother's capacity, Nancy-Gay Rotstein persisted during the hearing of the motion to assert that her mother's testamentary instruments were invalid due to incapacity. That is to say, Ms. Rotstein persisted in advancing a ground of testamentary invalidity notwithstanding that she had no evidence to support her position and that her evidentiary spokesperson, her husband, had admitted that Ruth Smith was competent. Such conduct, in my view, falls into the category of refusing to admit an issue – testamentary capacity - that should have been admitted, as put by Rule 57.01(1)(g). It constitutes conduct in the nature of harassing one party by the pursuit of fruitless litigation, in this case a fruitless objection to the issuance of probate, which is the kind of conduct that the Court of Appeal stated in the *Davies* case could attract an award of elevated costs.

[42] Ms. Rotstein engaged in similar conduct regarding her objection that her mother did not know of or approve the contents of her testamentary instruments. Even when faced with the evidence of her parent's lawyer, Mr. Claude Thomson, Q.C., about the circumstances surrounding the execution of the 1987 Will and the First and Second Codicils, Ms. Rotstein would not desist from pressing the issue. Yet, as I noted in paragraph 170 of my April Reasons, "Mr. Rotstein's affidavit does not contain any specific allegation, let alone any specific evidence, direct or circumstantial, that Ruth Smith did not know and approve of the contents of her 1987 Will and four codicils."

[43] So, too, with her allegations of undue influence against her brother. Notwithstanding her lack of personal knowledge about her parents' affairs at the relevant periods of time due to her self-imposed isolation from them, and notwithstanding the evidence of Mr. Thomson and Mr. Draimin about the circumstances surrounding the preparation and execution of the 1987 Will and its codicils, Ms. Rotstein put in issue over 30 years of Smith family history in a groundless effort to try to portray her brother as an "undue influencer" of their mother. I set out in paragraph 14 above the portions of my April Reasons finding that no air of reality existed for such allegations.

[44] In sum, Ms. Rotstein advanced bald allegations of testamentary invalidity, for which she offered no evidence in support, and which she persisted in pursuing at the hearing notwithstanding admissions made on her behalf by her husband against the position she took and the contrary evidence filed from independent witnesses.

C.2 The objector's allegations of misconduct against the applicant

[45] Second, through the evidence filed by her husband, Max Rotstein, and her counsel's submissions at the hearing, Ms. Rotstein made very, very serious allegations of misconduct against her brother – i.e. that he exercised a life-time of undue influence over their mother; he stripped away properties from their mother or placed them under his control in order to advance

his own financial interests; and, he exercised complete physical control over his mother, preventing her from maintaining a relationship with Nancy-Gay Rotstein. As I set out in my April Reasons, there was no evidence to support any of those allegations. They fell into the category of baseless allegations of wrongdoing and meritless claims of fraud, deceit, and dishonesty based on pure speculation against the other party which the jurisprudence has recognized may justify an award of elevated costs.

C.3 Ms. Rotstein's litigation strategy to challenge prior wills

[46] Third, following the Smith family's "Hiroshima" in 1976, Ruth Smith amended her 1975 Will to reduce the share of her residue given to her daughter, and she later executed the 1976 Will, 1978 Will, 1984 Will and 1986 Will that eliminated any gift of residue to Nancy-Gay Rotstein. The challenged 1987 Will continued that decision. At the hearing Ms. Rotstein took the position that all the wills and codicils her mother made following their estrangement in 1976 were invalid, and she intended to challenge the validity of each of those testamentary instruments *seriatim* until she arrived at a will which treated her equally with her brother. That remarkable position exemplified, in spades, the essentially harassing nature of Ms. Rotstein's will challenge.

C.4 Lack of merit to Ms. Rotstein's claims

[47] In her cost submissions Ms. Rotstein argued that "a finding that there is no genuine issue for trial does not create a *prima facie* basis for an elevated level of costs." As an abstract principle, I have no quarrel with that proposition. But the exercise of awarding costs is fact-specific; it does not turn on abstract principles standing divorced from what actually happened in the proceeding. In this case, notwithstanding the lack of merit to any of Ms. Rotstein's objections, she compelled the creation of a massive record which I described in my April Reasons as follows:

> [38] In any event, the evidentiary record in the case before me is full. Indeed, it is massive - motion records totaling five volumes; nine volumes of compendia; an eighteen volume medical brief; an eight volume transcript brief, a fourteen volume document brief; plus sundry other briefs.
>
> …
>
> [154] I should note that the responding party filed 18 volumes of medical records for Ruth Smith, amounting to some 5,308 pages. Most covered the period from 2002 on…

Also, Ms. Rotstein put her brother to a huge legal expense by persisting in objections long after it became clear that no evidence existed to give rise to a genuine issue for trial in respect of them. Such conduct tended to lengthen unnecessarily the duration of this proceeding, a factor Rule 57.01(1)(e) makes relevant to the consideration of costs.

[48] I repeat: Ms. Rotstein's position at the hearing was that she would challenge the validity of the last five wills made by her mother until the court accepted a will which treated her equally with her brother. I think the words of McDermid J. in *Beaurone v. Beaurone* are apposite to this case:

> In my opinion, it is often the case that wills are challenged in the expectation that there is little or nothing to lose by doing so, because at the end of the day, costs will be payable from the estate. The challenger, often a slighted relative who is denied the testator's largesse, has everything to gain and nothing to lose by trying to overturn the will.[22]

[49] In his costs submissions Mr. Smith described his sister's approach to this proceeding as "scorched earth litigation". I think that an apt description for this simple reason - Ms. Rotstein, who did not offer any personal or direct evidence about the circumstances surrounding the preparation and execution of the 1987 Will and its codicils, nevertheless put in issue over 30 years of Smith family history, persisted in advancing issues notwithstanding admissions against her position given by her husband, and failed to file any evidence which, at the end of the day, gave rise to a genuine issue for trial.

C.5 Conclusion on the objector's conduct

[50] While the will challenge process serves the important public policy objective of ensuring that courts only give effect to valid wills that reflect the intention of competent testators, it must be open to the courts to sanction, through elevated cost awards, meritless will challenges which are driven by blind emotion, but devoid of any material, relevant evidence. To do otherwise would risk undermining the stated intentions of testators and testatrixs and risk exhausting an estate, or inflicting financial harm on a beneficiary, by the pursuit of fruitless objections by a "slighted relative who is denied the testator's largesse."[23]

[51] Ms. Rotstein persisted in a will challenge which, on the facts of this family's history, really should never have been brought in the first place or, at least, should have been abandoned at a very early stage once Mr. Smith filed his evidence for the summary judgment motion. There was no justification, in law or in fact, for Ms. Rotstein to have taken her challenge through to the hearing of the summary judgment motion. To engage in baseless, hugely expensive, scorched earth litigation over the validity of a will is litigation conduct that falls into the category of "reprehensible" and merits the award of elevated costs. The will challenge procedures contained in Rules 74 and 75 of the *Rules of Civil Procedure* were not intended to be misused in the way

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[22] *Beaurone v. Beaurone, supra*., at para. 6.
[23] *Ibid.*

Ms. Rotstein did. As a result, Ms. Rotstein's conduct justifies making an award against her of full indemnity costs payable to the applicant/moving party, Lawrence Smith.

V. The appropriate quantum of indemnity

A. General principles

[52] Finding that the applicant/moving party is entitled to full indemnity costs does not end the cost determination process. The court must still take into account the overriding principle of the reasonableness of any cost award. In this regard, I am guided by the principles discussed by the Court of Appeal in the following portions of its decision in *Davies v. Clarington (Municipality)*:

> 51 In *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, the Divisional Court set out several principles that must be considered when awarding costs:
>
> 1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher*, *Moon*, and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
>
> 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
>
> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
>
> 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
>
> 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.
>
> 52 As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an

> amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."
>
> 53 Here, while the trial judge identified the importance of a reasonableness assessment, with respect, in arriving at a costs award of $509,452.18 her reasons do not indicate that she conducted an assessment or at least a sufficient one, in accordance the requirements set out in Boucher. Furthermore, although the trial judge did find that the parties would have reasonably expected Blue Circle to have *claimed* costs of this magnitude, she was, according to *Boucher* at para. 38, obliged to consider the expectations of the parties concerning the quantum of the costs *award*.
>
> 54 It is difficult to accept that the settling defendants would have expected that they would be faced with an award against them of this magnitude particularly in the light of Blue Circle's limited involvement in the proceedings. Blue Circle did not participate in the examination or cross-examination of any witnesses. In Blue Circle's own costs submissions, it is acknowledged that their case took two hours in total to put in. The parties could not have expected that the trial judge would treat the costs incurred after the February 2005 offer in the manner she did. They could not have expected that, through an elevated costs award, the trial judge would effectively reward Blue Circle for the assistance its counsel provided during the settlement discussions.[3]

[53] I also think that the objector accurately stated the law when she submitted, in paragraph 26 of her Cost Submissions, that:

> [I]n reviewing a claim for costs a judge need not undertake a line by line analysis of the hours claimed, nor should a court second guess the amount claimed unless it is clearly excessive or overreaching. A judge must consider what is reasonable in the circumstances and, after taking into account all of the relevant factors, should award costs in a more global fashion.

B. Fees

[54] Mr. Smith submitted a Bill of Costs seeking fees of $707,173.00 on a full indemnity basis. Ms. Rotstein argued that fees of $237,214.01, calculated on a partial indemnity scale, should be awarded.

[55] Ms. Rotstein’s Cost Submissions contained an extensive critique of Mr. Smith’s Bill of Costs. The critique was the most sophisticated one that I have yet seen as a judge, consisting of the meticulous analysis of billing rates, time charged for particular tasks, and comparisons between the billing practices of Mr. Shekter, who practices in a litigation boutique, and Mr.

Rabinowitz, who practices at a King and Bay St. firm. The analysis unfolded through detailed, colour-coded Excel spreadsheets.

[56] Although I found that fees analysis interesting, the objector's critique of the moving party's Bill of Costs lacked one critical component – the information that I had requested the objector to file about her own costs. In paragraph 313 of my April Reasons I made it clear that if a party filed cost submissions, they were to be accompanied by a Bill of Costs. I gave that direction for a very specific reason. Given the complexity of the issues in the proceeding, the obvious importance of the outcome to the parties, as well as to other beneficiaries of Ruth Smith's Will and codicils, the huge volume of material filed, the length and sophistication of the written factums filed, and the composition of each party's litigation team – each had lawyers from a King and Bay St. firm and a litigation boutique, with each retaining a prominent estates litigation lawyer – the resulting cost award, whatever the scale, would be in the hundreds of thousands of dollars.

[57] In light of the potential magnitude of the cost award, I had no doubt that one side would argue that the costs sought by the other were exorbitant, unreasonable and beyond the bound of any amount the unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs were being fixed: Rule 57.01(1)(0.b). One of the most effective ways to measure the reasonableness of the expectations of an unsuccessful party is to require that party to file a Bill of Costs as part of its costs submissions. If the unsuccessful party's lawyers billed, or docketed, huge fees and incurred substantial expenses, then those level of expenditures would be relevant to the issues of both how much the unsuccessful party could reasonably expect the successful side to claim for costs, as well as the quantum of costs that the court might award.[24]

[58] I asked Ms. Rotstein to file a Bill of Costs if she made cost submissions; she did not do so. Without being able to review the costs Ms. Rotstein incurred in this proceeding, I place little weight on the detailed critique she made of Mr. Smith's Bill of Costs. As I have noted, Ms. Rotstein's legal team mirrored the composition and the size of Mr. Smith's team. Her counsel submitted materials of the same sophistication and complexity as those of the moving party. In fact, Ms. Rotstein filed a significantly greater volume of materials on the motion than did Mr. Smith. In the absence of the requested Bill of Costs from the objector, those circumstances permit me to infer that the fees incurred by Ms. Rotstein on a full indemnity basis approximated those incurred and submitted by Mr. Smith. I therefore am not prepared to accept the objector's submission that the moving party has overreached in respect of the time claimed.

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[24] See *Davies, supra*., para. 53.

[59] As to the level of the hourly rates, Ms. Rotstein's Cost Submissions do enable some comparison of the hourly rates charged by her lawyers and those for Mr. Smith. Ms. Rotstein seeks a "set-off" of $16,136.65 for costs she incurred in respect of two steps during the motion which she submitted were unnecessary – the disclosure of medical records and their admission into evidence. In support of her claim she included a schedule which showed that Mr. Hull charged $625/hour and Mr. Sutton $630/hour. The highest rates sought for Messrs. Shekter and Rabinowitz were $625/hour. So, the hourly rates of each party's senior counsel were comparable, and I see no reason to adjust them for purposes of calculating full indemnity costs.

[60] Dealing with the merits of Ms. Rotstein's claim for a "set-off", I see none. The relevant medical records – i.e. those dealing with the periods of time surrounding the execution of the testamentary instruments – were few in number, and most of the 18 volumes of medical and nursing home records filed by Ms. Rotstein were completely irrelevant.

[61] Nor am I prepared to make reductions for any other intra-motion step taken by Mr. Smith. The only clear evidence I have regarding the merits of any intra-motion step are the reasons given by Master Birnbaum dismissing Ms. Rotstein's motion to compel her brother to answer certain questions refused on his cross-examination and that evidence works against Ms. Rotstein. As I noted in paragraph 10 of my April Reasons, Master Birnbaum wrote that "after hearing the submissions of counsel, my view is that Nancy-Gay and Maxwell have no evidence of undue influence and they wish to indulge in an extensive fishing expedition to find some support for their allegations…"

[62] I have reviewed carefully Mr. Smith's Bill of Costs. It breaks down the fees incurred by each stage of the litigation, clearly shows the time spent and hourly rates, and indicates that the file was managed by delegating appropriate tasks to junior counsel or clerks. It also shows that Mr. Shekter and Mr. Rabinowitz did not simply duplicate their work, but involved themselves to different degrees depending on the particular task.

[63] In sum, I have taken into account the factors set out in Rule 57.01(1); I have commented on the composition of the parties' legal teams, the complexity and importance of the issues, the litigation conduct of the parties, and the issue of reasonable expectations regarding the cost award in light of the conduct of Ms. Rotstein; I have also considered the principle of proportionality, which was implicit in the prior rules, and was made express in the amendments which came into force on January 1 of this year. I agree completely with the following comments on the issue of proportionality in awarding costs made by Gray J. in his decision in *Cimmaster Inc. v. Piccione (c.o.b. Manufacturing Technologies Co.)*:

> The principle of proportionality is important, and must be considered by any judge in fixing costs… However, in my view, the principle of proportionality should not normally

> result in reduced costs where the unsuccessful party has forced a long and expensive trial. It is cold comfort to the successful party, who has been forced to expend many thousands of dollars and many days and hours fighting a claim that is ultimately defeated, only to be told that it should obtain a reduced amount of costs based on some notional concept of proportionality. In my view… the concept of proportionality appropriately applies where a successful party has over-resourced a case having regard to what is at stake, but it should not result in a reduction of the costs otherwise payable in these circumstances.[25]

Finally, I have explained the inferences which I have drawn from Ms. Rotstein's failure to file a Bill of Costs as I had requested her to do. Taking all these factors into account, I conclude that a fair and reasonable award of full indemnity fees payable by Ms. Rotstein to Mr. Smith is $707,173.00.

C. Disbursements

[64] Turning to the disbursements, Mr. Smith seeks an award of $93,531.56. Ms. Rotstein submitted that only $26,507.84 should be awarded for disbursements. Her objections fell into four categories.

[65] First, Ms. Rotstein argued that the claimed disbursements should be reduced by $1,294.47 for various delivery, fax, telephone, postage and stationary charges because those items are not listed specifically in Part II of Tariff A to the *Rules of Civil Procedure*. I confess to some surprise at seeing this kind of argument being made in this day and age. However, I will disallow the long-distance telephone charges of $119.27, but I allow the others as I expect they related to the service or filing of various documents in this proceeding: Tariff Item 23.

[66] Second, Ms. Rotstein objected to a $250.00 disbursement for medical reports. I regard that expense as recoverable under Tariff Item 31: "copies of any documents…prepared for…a party for the use of the court and supplied to the opposite party…"

[67] Next, Ms. Rotstein took issue with the effort to recover $2,804.25 paid by the moving party to a mediator. I gleaned from the materials that the mandatory mediation did not take place, but not due to the fault of either party. Tariff Item 23.2 allows recovery of fees paid to a mediator, so I allow their recovery.

[68] Finally, Ms. Rotstein submitted that disbursements claimed of $19,750.00 and $42,055.00 as witness fees for Mr. Draimin and Mr. Thomson respectively should be disallowed,

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[25] 2010 ONSC 846, para. 19.

as well as the amount of $1,200.00 paid to Qualicare. I agree. A review of the invoices supporting those disbursement items reveals that the amounts paid to Qualicare and Mr. Thomson were for the time they spent in preparing their evidence for the proceeding. Mr. Draimin's invoices reflected time spent both on the preparation of his evidence, as well as time spent on the general administration of the estate. The latter is not recoverable as a "witness fee" in this proceeding. The remaining time of Mr. Draimin, and that of Mr. Thomson and Qualicare, are not recoverable because those witnesses were fact-witnesses, not expert witnesses, and Part II of Tariff A does not permit the recovery of amounts paid to fact-witnesses for time they expended (no doubt quite legitimately) in preparing their evidence for the proceeding.

[69] In sum, I disallow claimed disbursements of $119.27 (long distance telephone), $1,200.00 (Qualicare), $19,750.00 (Mr. Draimin) and $42,055.00 (Mr. Thomson), and award disbursements totaling $30,407.29.

VI. Summary and award

[70] For the reasons set out above, I award Mr. Smith full indemnity costs fixed at $707,173.00 for fees and $30,407.29 for disbursements, together with applicable G.S.T. on both amounts, and I order Ms. Rotstein personally to pay such costs to Mr. Smith within 120 days of the date of this order.

(original signed by)
D. M. Brown J.

Date: July 30, 2010