

Court of appeal clarifies jurisdiction to award costs against non-party

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Facts

In *Ontario Limited v Laval Tool* (1318847),⁽¹⁾ the Court of Appeal for Ontario considered the scope of the courts' jurisdiction to order costs against a non-party and examined the statutory and inherent authority for making such orders.⁽²⁾ The appeal in *Laval* arose from *Ontario Limited* (1318847) and its principal and shareholder, Emmanuel Azzopardi (the non-party), commencing two separate actions against the defendant claiming damages for breach of contract and unjust enrichment. The trial judge dismissed both actions, but refused to order costs against the non-party. The judge found that the non-party's actions arose from a "misguided view that [the non-party] could assert a personal claim against [Laval] through his corporation...not to insulate [himself] from a potential costs award...[and] it was, therefore, inappropriate to make a non-party costs order against [the non-party] in the 131 action".⁽³⁾

On appeal, Laval argued that the judge had erred by exclusively focusing on whether the non-party meant to avoid liability for costs, while failing to consider whether he had orchestrated a fictitious claim advanced through *Ontario Limited* for his own financial benefit.

Analysis

Authority to award non-party costs

In determining whether the trial judge had committed an error in principle by not considering the court's inherent jurisdiction to award costs against the non-party for abuse of process, the court of appeal first turned its attention to the statutory authority to award costs, pursuant to the Courts of Justice Act:⁽⁴⁾

"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."⁽⁵⁾

The court noted that while some jurisprudence suggests that this provision affords the authority to "order costs against a non-party in specified circumstances...there has been considerable ambiguity in the case law as to whether the court also possesses inherent jurisdiction to order non-party costs".⁽⁶⁾ Awarding costs against non-parties dates back to the 1911 *Sturmer* decision,⁽⁷⁾ but confusion arose as to whether the authority was inherent or statutory. The court of appeal accordingly set out to "disambiguate the two sources of the court's jurisdiction to order non-party costs and explain how they interact and should be respectively exercised".⁽⁸⁾

While the source for awarding costs against a non-party is murky, the test for doing so is clear. It is applied:

"where a named party of record is merely a 'man of straw,' or the 'formal' or 'ostensible'

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litigant, while the non-party is the 'real' or 'substantial' litigant who 'set in motion,' 'supported,' 'instigated' or 'actively promoted' the litigation, 'putting forward' the named party in its own place 'for the purpose of avoiding liability'." (9)

Since *Sturmer*, courts have established that Section 131(1) of the Courts of Justice Act "confers jurisdiction to order non-party costs only if the 'person of straw' test is met. If a court makes such an order when the test is not met, it exceeds its statutory jurisdiction". (10) This suggests that courts must derive authority to award non-party costs from a different source where the test is not satisfied. (11) The court of appeal addressed this and held as follows:

"The court clearly has authority, derived from its inherent jurisdiction to prevent an abuse of process, to award costs against a non-party who has proved to be the real person controlling the litigation but has put forward a "man of straw" to avoid liability for costs or other reasons." (12)

Clarifying statutory and inherent authority to award non-party costs

Part of the ambiguity surrounds inquiries made under the person of straw test:

"[The test] does not ask whether the non-party engaged in misconduct serious enough to amount to abuse of the court's processes. Rather, it is a factual inquiry that asks whether the party of record is only the 'formal' or 'ostensible' litigant and whether the non-party is the 'real' or 'substantial' litigant, controlling the proceedings and advancing the named party for the purpose of deflecting liability for costs. The aim is to determine whether the non-party, as a matter of fact, functions as if it were a 'party' in relation to which the court has statutory jurisdiction to order costs under [Section 131(1) of the Courts of Justice Act], but put someone else forward to avoid costs consequences." (13)

However, the court of appeal interpreted Section 131 of the Courts of Justice Act as "permissive"; and while it "confers statutory jurisdiction to order costs against parties only, this does not undermine the provision's permissiveness, as the provision does not explicitly prohibit the court from ordering non-party costs". (14) Reading Section 131 as restrictive (ie, proscribing a court's power to award non-party costs) is arguably unconstitutional, as it would limit the court's ability to control its own process. (15)

Apart from the statutory jurisdiction, and in addition to the court's power to stay, dismiss or strike out frivolous, vexatious or abusive proceedings, (16) the "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". (17)

Costs as deterrent for abuse of process

Ultimately, the court of appeal sought to prevent abuse of process and preclude non-parties which engage in improper conduct from insulating themselves from cost awards. Where a "non-party intentionally put[s] forward the nominal plaintiff for the purpose of putting up a costs screen...insofar as a non-party resembles a maintainer, (18) thereby committing an abuse of process, a costs award against it may be warranted". (19) In applying this principle to the non-party, the court effectively pierced the corporate veil and disregarded the corporation's separate legal personality.

The non-party's conduct exceeded "merely...caus[ing] the corporation to commence litigation as the named party". (20) The court therefore made the costs award against the non-party, a corporate principal, on the basis that:

"costs against non-parties who are directors, shareholders or principals of corporations may be ordered in exceptional circumstances if the non-party commits an abuse of process... such circumstances may include fraud or gross misconduct in the instigation or conduct of the litigation." (21)

Since the trial judge had erred in principle by failing to conduct "a broader analysis of whether he had inherent jurisdiction to order costs against [the non-party] because [he] committed an abuse of process", (22) the court could review this determination. Imposing a cost award against the non-party, the court rationalised its decision as follows:

"The proceeding was fictitious...the effect was that [the appellant] had to defend two equally fruitless proceedings and incur the costs of each by retaining separate counsel. [The appellant's] resources, public resources and judicial resources were wasted. Safeguarding public confidence in the fair administration of justice depends on preserving the availability of court facilities for justifiable proceedings and not permitting the costs of proceedings to be needlessly inflated, particularly at a time when delays and costs of litigation are so concerning from the perspective of access to justice...A costs sanction against [the non-party] would achieve these objectives." (23)

Comment

This decision is a sharp warning to those that seek to eschew personal responsibility for litigation misconduct and use a corporate entity in an attempt to insulate themselves from an adverse costs award. Much like the courts can impose cost awards against lawyers for causing "costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default", (24) the court of appeal has affirmed the courts' inherent jurisdiction to impose non-party cost awards in the face of abuse of process or vexatious conduct that undermine the fair administration of justice.

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Endnotes

(1) 2017 ONCA 184.

(2) "The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law...Inherent jurisdiction is a residual source of power which a superior court may draw on in order to ensure due process, prevent vexation and to do justice according to law between the parties. One aspect of these inherent powers is the power to regulate the court's process and proceedings." See *Endean v British Columbia*, 2016 SCC 42 at paras 23 and 60.

(3) *Laval*, *supra* note 1 at paras 12-13.

(4) RSO 1990, c C43 [Courts of Justice Act].

(5) *Ibid*, s 131(1).

(6) *Laval*, *supra* note 1 at para 23.

(7) *Re Sturmer and Town of Beaverton* (1911), 25 OLR 190 (HC).

(8) *Laval*, *supra* note 1 at para 24.

(9) *Ibid* at para 35. The test is referred to as the 'person of straw test' or the 'straw man test'. This test is satisfied where the non-party has status to bring the action; the named party is not the true litigant; and the named party is a person of straw put forward to protect the true litigant from liability for costs. See *Middlesex Condominium Corporation 232 v Bodkin*, 2014 ONSC 106 at para 27.

(10) *Ibid* at para 45.

(11) *Ibid* at para 48.

(12) *St James' Preservation Society v Toronto (City)*, 2007 ONCA 601 at para 52.

(13) *Ibid* at para 64.

(14) *Ibid* at para 71.

(15) *Ibid* at para 72, citing the Constitution Act, 1867, 30 and 31 Vict, c 3, s 96.

(16) Rules of Civil Procedure, RRO 1990, Reg 194, Rules 2 1 01 (1), 25 11.

(17) *Laval, supra* note 1 at para 66. "The doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process...The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute." *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 39 and 41.

(18) "For there to be maintenance, the person allegedly maintaining an action or proceeding must have an improper motive, which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse... The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse." *McIntyre Estate v Ontario (Attorney General)*, [2002] OJ 3417 (ONCA) at paras 32 and 34.

(19) *Laval, supra* note 1 at paras 75 and 83.

(20) *Ibid* at para 63.

(21) *Ibid* at para 77. However, if costs are awarded against non-parties, as a matter of procedural fairness they must first be given notice of the intention to seek cost awards against them. *Ibid* at para 79, citing *St James' Preservation Society*.

(22) *Ibid* at para 84.

(23) *Ibid* at paras 86 to 87.

(24) Rules of Civil Procedure at R 57 07(1).

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