

Combating abuse or chilling strategic decision making?

July 11 2017 | Contributed by [Dentons](#)

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On December 6 2016 the Supreme Court reaffirmed its ability to award costs against lawyers. Despite the special role played by defence lawyers in criminal proceedings, the Supreme Court held that judges retain ultimate discretion to manage and control the proceedings before them. The Supreme Court found that costs had been properly awarded against Robert Jodoin, as the circumstances were extreme and particularly reprehensible.⁽¹⁾

Facts

In April 2013 Jodoin requested that the Quebec Superior Court stamp numerous motions for writs of prohibition on the morning of a scheduled hearing. An experienced criminal lawyer, Jodoin was acting for 10 clients that had been charged with impaired driving. He alleged that the judge who was to preside over the hearings had demonstrated bias.

Unbeknownst to Jodoin, the judge that he had filed the motions for writs of prohibition against was unable to oversee the hearings that day and another judge would preside in his place. Over the lunch hour, Jodoin hurriedly drew up additional writs of prohibition alleging bias on the part of the second judge challenging his jurisdiction. The second judge was consequently compelled to adjourn the hearings.

Judicial history

Quebec Superior Court

The Superior Court relied on *Quebec (Attorney General) v Cronier* in respect of the proposition that a judge has the discretion to award costs in criminal proceedings against a lawyer personally. Justice L'Heureux-Dubé found that there is an "inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute".⁽²⁾

The Superior Court judge found that Jodoin's attempts to stall the proceedings were not only deliberate but "a frivolous proceeding that denotes a serious abuse of the judicial system".⁽³⁾ Additionally, it was concluded that Jodoin's tactics interfered with the court's ability to properly conduct case management. As a result, Jodoin had costs of \$3,000 awarded against him.

Quebec Court of Appeal

The Quebec Court of Appeal set aside the award of costs against Jodoin. While the Court of Appeal acknowledged the inherent right of the Superior Court to award costs against a lawyer personally in a criminal proceeding, the court asserted that this extreme measure must be implemented only when absolutely necessary. The court found that Jodoin's actions did not "have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice".⁽⁴⁾

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Majority's decision

Comparative consequences

At the Supreme Court, the majority recognised the significant common law history of awarding costs against lawyers who have intentionally disrupted the proper administration of justice. The court found that lawyers have a duty to ensure that their conduct is consistent with their status.

The majority considered the wider implications for a lawyer charged with contempt or under a law society investigation in the alternative to the awarding of costs. Contempt carries a potential term of imprisonment, is a matter of law and must be proved beyond a reasonable doubt.⁽⁵⁾ The court concluded that the societal stigma of awarding costs is lesser than both in the short and long term.

While law societies are responsible for the regulation of lawyers' conduct, the court has the ultimate jurisdiction to punish inappropriate behaviour. The court stated that the judiciary does not have to seek the law society's approval when awarding personal costs against a lawyer. However, the law society has the power to exercise its parallel authority in assessing members' conduct and imposing appropriate penalties.⁽⁶⁾

High threshold for awarding costs

The majority reaffirmed that the threshold for awarding costs is high and the decision to do so would necessarily be ordered on an infrequent basis. As L'Heureux-Dubé found in *Cronier*, the abuse of process must be dishonest and frivolous and seriously undermine the administration of justice.⁽⁷⁾ However, she also added that this power must not be exercised in an unlimited and arbitrary matter and must be reserved for necessary instances.⁽⁸⁾ As stated in *Myers v Elman*, a mere mistake or error of judgement will not be sufficient to award costs personally against a lawyer; there must be gross neglect or inaccuracy.⁽⁹⁾

Two guideposts

When a court is deciding whether to award costs against lawyers personally, there are two significant guideposts that must be considered. The first applies to criminal proceedings in which the special role of a defence lawyer must be judicially recognised. Awards of costs must be purely punitive and not have a compensatory nature, as is the case in civil disputes.⁽¹⁰⁾ The principal difference between the duties of a criminal and civil lawyer lies in the criminal lawyer's ability to challenge both the decisions of the state and the arguments of other lawyers in order to successfully represent their client. In the Supreme Court's opinion, *Groia v Law Society of Upper Canada* recognised the need for "committed and zealous advocacy for client's rights and interests" and that a "strong and independent defence bar are essential in an adversarial system of justice".⁽¹¹⁾ If the court finds it necessary to award costs against a criminal lawyer, there must be an emphasis on the ongoing duty of the lawyer to properly defend their client in future matters.

The second guidepost seeks to ensure that any decision concerning misconduct relates only to the facts of the case and not the broader career of the lawyer. External evidence may at times be referenced, but only when absolutely necessary.

Superior Court

The majority held that the Superior Court judge had properly awarded costs against Jodoin. The lower-court judge not only correctly identified the conduct as deliberate, but also appropriately considered the facts in finding that the conduct disrupted the ability of judges to carry out their work.⁽¹²⁾

The Supreme Court held that the respondent's odd conduct of filing both series of motions for writs of prohibition against the two judges demonstrated a blatant attempt to force the judge to postpone the hearings. The Superior Court judge was therefore correct in his conclusion that the "respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice".⁽¹³⁾

In *R v Jordan*, the Supreme Court noted the responsibility of all participants in the criminal justice system to "achieve reasonably prompt justice".⁽¹⁴⁾ In *Jodoin*, it was the majority's opinion that the Superior Court judge's decision to award costs helped to achieve this objective.

Dissent

In dissent, Justices Abella and Côté found that the court's ability to award costs against a lawyer should be reserved for extreme circumstances. In the dissent's opinion, Jodoin's actions did not warrant such an award. Awarding costs for behaviour that was not unique could have a chilling effect on criminal defence counsel's attempts to defend their clients. The dissenting justices also emphasised the need for the crown to restrict seeking such orders and the fact that disciplinary action from the law society may be more appropriate in the circumstances.

Comment

The Supreme Court properly weighed the special considerations of the role of the defence counsel with the overwhelming duty of the courts to ensure public trust in the proper administration of justice.

The defence counsel's ability to represent his or her client is an integral part of the Canadian criminal justice system. However, this must be balanced against the public's expectation that lawyers will ensure that the legal processes remain efficient and effective. The ability of the courts to award personal costs against lawyers for procedural tactics conducted in bad faith is well within their mandate to manage the proceedings before them. The Supreme Court's decision in this case emphasised the fact that, according to the court, there is a clear difference between strategy and abuse.

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Endnotes

- (1) *Quebec (Criminal and Prosecutions) v Jodoin*, 2017 SCC 26, paragraph 42.
 - (2) *Quebec (Attorney-General) v Cronier* (1981), 63 CCC 2(d) 437 (Que CA), paragraph 115.
 - (3) *Quebec Superior Court* (2013 QCCS 4661), paragraph 117.
 - (4) *Quebec Court of Appeal* (2015 QCCA 847), paragraph 11.
 - (5) *Ibid.*
 - (6) *Ibid*, paragraph 23. v
 - (7) *Supra* note 2, paragraph 51.
 - (8) *Supra* note 2, paragraph 62.
 - (9) [1940] AC 282 (HL).
 - (10) *Supra* note 1, paragraph 31.
 - (11) *Ibid* at paragraph 32. See also *Groia v Law Society of Upper Canada*, 2016 ONCA 471.
 - (12) *Supra* note 1, paragraph 41.
 - (13) *Ibid*, paragraph 42.
 - (14) 2016 SCC 27.
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