

**CITATION:** St. Joseph’s Hospital v. Thunder Bay (City), 2025 ONSC 2124  
**COURT FILE NO.:** CV-20-0361-00  
**DATE:** 2025-04-04

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
 )  
ST. JOSEPH’S HOSPITAL ) *Jordan Lester*, for the Plaintiff (Responding  
 ) Party on Motion and Moving Party on  
 ) Cross-Motion)  
 )  
Plaintiff )  
 )  
- and - )  
 )  
 )  
THE CORPORATION OF THE CITY OF ) *Jeffrey Brown*, for the Defendant(Moving  
THUNDER BAY ) Party on Motion and Responding Party on  
 ) Cross-Motion)  
 )  
Defendant )  
 )  
 )  
 ) **HEARD:** March 27, 2025,  
 ) at Thunder Bay, Ontario

2025 ONSC 2124 (CanLII)

**Madam Justice R.A. Lepere**

**Endorsement On Motion**

**Overview**

[1] The Plaintiff, St. Joseph’s Hospital, commenced the within action against the Defendant, The Corporation of the City of Thunder Bay (the “City”) seeking damages which they allege occurred as a result of the City’s addition of sodium hydroxide to the municipal water supply causing pin hole leaks in copper pipes (the “Action”). The Plaintiff initially sought damages of \$350,000.00 but, once crystallized, its damages were reduced to \$205,383.62.

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[2] Shortly after the Action was commenced another claim was commenced in the Ontario Superior Court of Justice against the City pursuant to the *Class Proceedings Act, 1992* making the same allegations and seeking damages for residents and business owners in Thunder Bay, Ontario arising from pin hole leaks in copper pipes (the “Class Action”).

[3] While St. Joseph’s Hospital was aware of the Class Action by March 30, 2021, it chose to continue to pursue the Action independent of the Class Action.

[4] The Class Action was certified on July 6, 2023, and the opt-out deadline expired on January 15, 2025. The Plaintiff never opted out of the Class Action.

[5] On March 6, 2025, the Plaintiff advised that it intended to join the Class Action. There was then a dispute between the parties as to whether the Action should be stayed on a permanent or temporary basis. Furthermore, the City took the position that it was entitled to costs thrown away in the Action.

[6] The City brought a motion to stay the Action and for costs thrown away in the amount of \$62,732.50, inclusive of HST and disbursements.

[7] The Plaintiff brought a cross-motion for a temporary stay of the Action and for costs of a Case Conference that was held on March 16, 2023, in the amount of \$1,561.50, inclusive of HST and disbursements.

[8] At the outset of the motions, the parties agreed to an Order that the Action be stayed. As such, the only issues on the motion/cross-motion were as follows:

- a. Is the City entitled to its costs thrown away in the amount of \$62,732.50 from the Plaintiff?

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- b. Is the Plaintiff entitled to costs of the Case Conference on March 16, 2023, in the amount of \$1,561.50 from the City?

### **Costs Thrown Away – Legal Principles**

[9] In the case of *Nelson v. Chadwick*, 2019 ONSC 4544, at para. 27, Verbeem, J. provides a useful summary of the principles to be considered in relation to a claim for costs thrown away:

“Costs thrown away is a request for payment of a party's costs for wasted trial preparation including preparation that will have to be redone as a result of the trial adjournment and are generally payable on a full or substantial recovery basis. An award of "costs thrown away" is not designed to penalize a party who seeks, or is responsible for, an adjournment of the trial, but rather to indemnify a party for the wasted time incurred for trial preparation that was stripped of its value as a result of a subsequent adjournment or mistrial. The assessment of "costs thrown away" is an intuitive exercise that is not performed with exacting precision. The court is required to carefully review a party's bill of costs to determine, intuitively, what portion of the trial preparation or work falls within the scope of "wasted time. [Citations omitted].

[10] While one of the most common scenarios for costs thrown away arises from the adjournment of a trial, they can be awarded in other instances such as renewed preparation of a witness following cancellation of examinations: see *Gaibisels v. Solart LLP Corp.*, 2024 ONSC 2090, at para. 35.

### **City's Claim for Costs Thrown Away**

[11] The City's claim for costs thrown away can be broken into two categories.

[12] Firstly, it is the position of the City that it was required to review and produce a further and better Affidavit of Documents at the request of the Plaintiff. It is the position of the City that this review did not result in a significant decrease in the documents produced and was an unnecessary

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exercise now that the Plaintiff is joining the Class Action. The City seeks costs thrown away in the amount of \$39,534.00 related to this review of its Affidavit of Documents.

[13] Secondly, it is the position of the City that the Plaintiff cancelled scheduled examinations for discovery in November 2023 for which the City had already incurred costs related to the preparation of its witness. The City seeks costs thrown away in the amount of \$23,202.50 related to the cancellation of the November 2023 examinations for discovery.

[14] In support of the quantum claimed for costs thrown away, the City has not provided a Bill of Costs. The evidence filed in support of the quantum is as follows:

- a. A statement in the Affidavit of Ashley Owens-Nunziato, sworn January 27, 2025, (the "Affidavit") that a former associate, Nabil Mahmood incurred approximately 118 hours reviewing documents further to the order for a further and better Affidavit of Documents;
- b. A statement in the Affidavit that she was informed by Mr. Brown that he and Mr. Theall spent a full day preparing the City's witness for the discoveries on November 2, 2023, and it was not until the end of the preparation of the meeting (around 2pm) that he saw the email from Mr. Lester's office indicating they could not find an alternative court reporter;
- c. A statement in the Affidavit that she was informed by Mr. Brown that he and Mr. Theall each spent 15 and a half hours preparing the City witness for discovery (although it is unclear whether this time relates to the November 2023 examinations or the March 2024 examinations) and Mr. Brown spent a further 6 hours gathering key documents for the witness;
- d. A statement in the Affidavit that she was informed by Mr. Brown that the City incurred legal fees for Mr. Brown and Mr. Theall to attend multiple case conferences, source alternate reporters, and reschedule examinations for discovery; and
- e. A chart located in the Affidavit that lists the lawyers, their time related to the claim for costs thrown away, and their hourly rates.

[15] At the hearing of the motion, Mr. Brown stated that the costs thrown away for the examinations for discovery are only in relation to the cancellation of the November 2023

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examinations. He also confirmed that the costs thrown away do not include anything for pleadings, preparation of the original Affidavit of Documents or attendances at Case Conferences.

*A. Costs Thrown Away – Affidavit of Documents*

[16] The City served its sworn Affidavit of Documents in the Action in December 2022. The Plaintiff took issue with same as it contained 18,842 documents and demanded a further and better Affidavit of Documents from the City. When the City did not provide same, a Case Conference was held before Nieckarz J. on March 16, 2023.

[17] Nieckarz J. ordered the City to produce a further and better Affidavit of Documents and, more specifically, that the City remove any irrelevant documents.

[18] In response to same, the City deleted all documents dated after March 19, 2018 (other than those specific to the Plaintiff), which is the date the City first added sodium hydroxide to the municipal water supply. This reduced the Affidavit of Documents by 5,775 documents.

[19] The City states that an associate, called to the Bar in 2021 and billing at a rate of \$335.00/hour, then spent 118.5 hours reviewing the remaining 13,067 documents to remove irrelevant documents. The following is the evidence of the City:

- a. 231 documents were removed following this review as being irrelevant; and
- b. 7,683 documents were removed following this review as being the least relevant but are likely to be produced in the Class Action.

[20] The order for a further and better Affidavit of Documents reduced the documentary production in the Action by more than 13,000 documents.

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[21] In asserting its claim for costs thrown away in relation to the production of a further and better Affidavit of Documents the City states the following:

- a. The Affidavit of Documents that was produced was essentially the same as the one to be produced in the Class Action. The City could not treat the Action as a lesser action, as a finding in the Action could have implications for the Class Action and bind the City with respect to same. Therefore, the City had to defend the Action on the same basis as the Class Action even though the monetary damages being claimed were less.
- b. The Plaintiff should have opted into the Class Action sooner and avoided the need for a further and better Affidavit of Documents. If Nieckarz J. had known that the Plaintiff would be joining the Class Action a year after the Case Conference, it is unlikely that she would have made the order dated March 16, 2023.
- c. The review ordered by Nieckarz J. did not result in a substantial reduction of the documents produced by the City and was, therefore, an unnecessary exercise.
- d. The Plaintiff was on notice that the City intended to vigorously defend the Action and chose not to join the Class Action until March 2024.

[22] The Plaintiff takes the position that it should not be ordered to pay any costs thrown away related to the Affidavit of Documents for the following reasons:

- a. The further and better Affidavit of Documents was ordered by a judge. If Nieckarz J. did not see merit in the position of the Plaintiff at the Case Conference, she would not have made the Order. The City cannot claim costs thrown away for a step in the proceeding that they were ordered to perform.
- b. The Plaintiff was entitled to continue with the Action and did not have to join the Class Action. While it has now joined the Class Action it has only done so due to the litigation tactics of the City to date which is essentially forcing the hand of the Plaintiff to join the Class Action.
- c. The amount claimed for the costs thrown away in relation to the Affidavit of Documents is not proportionate when you consider an action worth just over \$200,000.00. Furthermore, the hours spent, and hourly rate charged are excessive in the circumstances.

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[23] I am not prepared to order that the Plaintiff pay the City's costs thrown away related to the further and better Affidavit of Documents, for the following reasons. Firstly, the City has not provided a Bill of Costs to support the amount claimed. The only evidence before the court is a blanket statement of the total number of hours spent from a law clerk. There is no explanation as to why it took 118 hours. Without a Bill of Costs, I cannot engage in the intuitive exercise to assess the quantum of any claim for costs thrown away asserted by the City: see *Nelson v. Chadwick*, 2019 ONSC 4544 at para. 27.

[24] Secondly, the City was ordered to produce a further and better Affidavit of Documents. They were not forced to do so by the Plaintiff. If Nieckarz J. at the Case Conference did not see merit in the Plaintiff's request for a further and better Affidavit of Documents, an order for same would not have been made. The City is not entitled to costs thrown away for something that they have been ordered to do, as same cannot be viewed as "a waste of time".

[25] Thirdly, the review conducted following the order of Nieckarz J. significantly reduced the scope of documentary disclosure in the Action and was therefore "not a waste of time". Furthermore, this exercise should have been done at the outset when the Affidavit of Documents was prepared.

[26] Lastly, while I appreciate that the Plaintiff could have joined the Class Action sooner, thereby avoiding the review of the Affidavit of Documents ordered by Nieckarz J., the same Affidavit of Documents in the Class Action was served in the Action. It was the submission of the lawyer for the City that this was done because the issues in the two actions were the same and the City had to defend the Action in the same manner and on the same basis as the Class Action. As

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such, many documents relevant to the Class Action would also be relevant in the Action. If this is the case, then it is reasonable to conclude that many of the documents removed further to the Order of Nieckarz J. are also not relevant to the Class Action. As such, the Affidavit of Documents has been reduced for the purpose of the Class Action, which will benefit all parties, and the review conducted cannot be viewed as “a waste of time”.

[27] While I am not prepared to order costs thrown away in relation to the Affidavit Documents, I will note that the hourly rate charged (\$335.00) by an associate who was called in 2021 is excessive in the circumstances. A rate of \$200.00/hour would be more appropriate in the circumstances for a lawyer practicing for a year or two in Thunder Bay. While a client is free to retain whomever they wish, when it comes to a question of costs, the court should review hourly rates through the lens of what would be reasonable for the party against whom the order is made, which includes a consideration of the hourly rates where that party is ordinarily resident.

*B. Costs Thrown Away – Cancelled Discoveries*

[28] Examinations for discovery in the Action were scheduled for November 21 to 23, 2023 (the “November Examinations”).

[29] On October 20, 2023, the City was advised that the scheduled court reporter was no longer available. The Plaintiff’s lawyer advised that his office would try to locate an alternate reporter.

[30] On November 2, 2023, Mr. Lester, counsel for the Plaintiff, wrote to Mr. Brown, counsel for the City, and advised that they had been unable to find a court reporter and proposed alternate dates for the examinations in December 2023.

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[31] On November 7, 2023, Mr. Brown advised Mr. Lester via email that the City's witness was not available in December. The City wanted to proceed on the scheduled dates and could do so using a virtual reporter. Mr. Lester responded the same day advising that he wanted an in-person reporter due to the number of documents produced and provided alternate dates in January and February of 2024.

[32] On November 9, 2023, Mr. Brown then suggested that the examinations could proceed virtually. On November 10, 2023, Mr. Lester advised that he was not in agreement due to the number of documents produced and stated that the November Examinations would not be proceeding. Mr. Brown responded later the same day advising that they had located a court reporter that could attend in person and intended to proceed on the scheduled dates.

[33] On November 11, 2023, Mr. Lester advised that he was no longer available as he had now scheduled other matters on the originally scheduled dates. Mr. Brown advised Mr. Lester on November 13, 2023, that the City would be seeking costs thrown away for the cancelled discoveries.

[34] The discoveries were re-scheduled for March 26, 2024 to March 28, 2024 (the "March Examinations"). These discoveries were then cancelled when the Plaintiff advised, on March 6, 2024, that it intended to join the Class Action. The City, during its submissions, confirmed that it was not seeking any costs thrown away related to the cancellation of the March Examinations.

[35] The City asserts that it incurred costs preparing its witness on November 2, 2023, prior to receiving notice that Mr. Lester could not locate a new court reporter later in the day on November 2, 2023. Due to the cancellation of the November Examinations, the City seeks the cost of that

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preparation in the amount of \$23,202.50 as costs thrown away. The City asserts that it is entitled to costs thrown away on the following basis:

- a. It offered alternative solutions to the Plaintiff to ensure that the discoveries could proceed in November 2023, but the Plaintiff rejected those options (virtual court reporter and virtual examinations);
- b. As of November 10, 2023, it had located a court reporter that could attend in person but by that time Mr. Lester indicated that he had already scheduled other matters on the original scheduled dates and was no longer available; and
- c. While the November Examinations were re-scheduled to March 2024, prior to same the Plaintiff gave notice that it intended to join the Class Action, rendering any preparation time completed in November 2023 as wasted. It is the position of the City that the Plaintiffs should have joined the Class Action earlier.

[36] The Plaintiff takes the position that it should not be ordered to pay any costs thrown away related to the November Examinations for the following reasons:

- a. The City was aware by October 20, 2023, that there was a risk that the November Examinations would have to be re-scheduled and should not have incurred any time in relation to same until the issue was resolved;
- b. The City has not filed sufficient evidence to establish the quantum of the costs thrown away being sought;
- c. In order to be entitled to costs thrown away the City has to prove that the time claimed was “wasted”. In this instance the City has not provided any evidence to establish this. Preparation time, if any could be used in relation to the Class Action given the overlap of the issues in the two proceedings; and
- d. The amount claimed for the costs thrown away in relation to the examinations for discovery is not proportionate when you consider an action worth just over \$200,000.00. Furthermore, the hours spent, and hourly rate charged, are excessive in the circumstances.

[37] I am not prepared to order that the Plaintiff pay the City’s costs thrown away related to the November Examinations for the following reasons. Firstly, the City had notice on October 20, 2023 that the November Examinations may not be proceeding. There is no evidence before the

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Court to prove that the City incurred preparation time related to the examinations prior to October 20, 2023.

[38] Secondly, while I take some issue with the fact that Mr. Lester re-scheduled other matters on the dates booked for the examinations in November 2023 prior to working out the details of an adjournment with the City, I find that the City had notice that there was an issue as to whether the examinations were going to proceed as of October 20, 2023. Until that issue was resolved (albeit frustrating for the City and its lawyers) costs related to the November Examinations should not have been incurred.

[39] Thirdly, the City did not file a Bill of Costs to corroborate the evidence of the law clerk in her Affidavit as to when the witness preparation took place for the November Examinations and the number of hours incurred. Without a Bill of Costs I cannot engage in the intuitive exercise to assess the quantum of any claim for costs thrown away asserted by the City: see *Nelson* at para. 27.

[40] Fourthly, no evidence was provided as to why witness preparation was still being conducted in the face of an email from Mr. Lester indicating that no court reporter was booked for the November Examinations and why preparation was take taking place several weeks before the scheduled dates.

[41] Fifthly, while there is some evidence that Mr. Brown and Mr. Theall incurred costs preparing the City's witness for the November Examinations on November 2, 2023, I do not find this evidence to be sufficient to prove the City's claim for costs thrown away for the following reasons:

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- a. It is unclear from the evidence whether the 15.5 hours being claimed by each of Mr. Brown and Mr. Theall related to the November Examinations only or also the March Examinations. Mr. Brown conceded at the motion that the City is not seeking costs thrown away in relation to the cancellation of the March Examinations. Without information as to whether the 15.5 hours being claimed by each of Mr. Theall and Mr. Brown relates to the November Examinations or March Examinations, or both, I cannot determine what, if anything, the Plaintiff should be liable for given the City's concession on the costs thrown away for the March Examinations. If a Bill of Costs had been filed by the City in support of its claim for costs thrown away this issue could have been easily determined.
  - b. There is limited evidence as to Mr. Theall's involvement in the Action and/or the necessity of same. When Mr. Brown was asked, he indicated that Mr. Theall was senior counsel. However, Mr. Brown was called to the Bar in 1999. If the City authorized both of these senior lawyers to work on the file that is their choice, but that is not a cost that should be borne by the Plaintiff in this instance.

[42] Sixthly, with respect to the six hours claimed by Mr. Brown for locating key documents for the City witness, this is not "wasted time", as the City witness will likely need those documents for the examinations in the Class Action. The passage of time between the November 2023 and the examinations in the Class Action does not render this work unnecessary or wasted thereby entitling the City to costs thrown away for same.

[43] Lastly, some (if not all) of the work preparing the witness for the examinations in the Action is not necessarily wasted time. While I understand that the discoveries in the Class Action will take place some time after the alleged preparation in November 2023, all of that preparation will not be lost simply due to the passage of time. The preparation for the examinations in the Class Action will likely be shorter because of this earlier preparation.

[44] While I am not prepared to order costs thrown away in relation to the November Examinations, I reiterate my comments at para. \_\_ of this decision regarding the hourly rates of Mr. Brown and Mr. Theall. A rate of \$400.00 to \$450.00/hour would be more appropriate in the circumstances in Thunder Bay for lawyers with their level of experience.

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**Plaintiff's Claim for Costs of Case Conference**

[45] The Plaintiff on its motion seeks costs of \$1,561.50 for the Case Conference held on March 16, 2023. The have provided a Bill of Costs to support the amount claimed. Mr. Lester confirmed during submissions that costs were not sought at the Case Conference.

[46] The City asserts that no order for costs related to the Case Conference ought to be made as Nieckarz J., in her endorsement, was silent as to the costs of the Case Conference. It is the City's position that this means that no costs were to be awarded.

[47] I agree with the position of the City on this issue and find that the Plaintiff is not entitled to their costs from the March 16, 2023, Case Conference. The law is clear that where a motion judge is silent in his or her endorsement on costs then there is to be no order as to costs: see *Magnussen Furniture Inc. v. Mylex Limited* (2007), 31 B.L.R. (4th) 143 at para. 43 (Ont. S.C.). There is no reason not to extend this principle to costs related to attendances at Case Conferences. If the Plaintiff wanted costs of the Case Conference, those costs should have been dealt with at the Case Conference and included within Nieckarz J.'s order.

**Conclusion**

[48] The Action is stayed.

[49] The City's claim for costs thrown away in the amount of \$62,732.50 is dismissed.

[50] The Plaintiff's claim for costs of the Case Conference in the amount of \$1,561.50 is dismissed.

[51] As for the costs of the motion and cross-motion I find that there was divided success amongst the parties and make no order as to costs for the motion or the cross-motion.

“original signed by”  
The Hon. Madam Justice R.A. Lepere

**Released:** April 4, 2025

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**B E T W E E N:**

St. Joseph's Hospital

Plaintiff

- and -

The Corporation of the City of Thunder Bay

Defendant

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**ENDORSEMENT ON MOTION**

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Lepere J.

**Released:** April 4, 2025