

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Louise Murray-Leung and Leslie Murray-Leung, Applicants

-and-

Brian James Dyck and Jodi Lynn Eastwood, Respondents

BEFORE: MacNeil J.

COUNSEL: *T. David Marshall and Matthew Jarrett* – Lawyers for the Applicants

William W.N. Fawcett – Lawyer for the Respondents

REASONS FOR DECISION ON COSTS

[1] This is my decision on costs respecting the Applicant’s application for property rights – either ownership by way of adverse possession or a prescriptive easement – over portions of the Respondents’ property. The primary relief sought related to the driveway area shown on a survey, dated May 28, 2021, obtained and filed by the Applicants. The other property at issue was the area from the Applicants’ property line on the said survey to two trees showing just north on the Respondents’ property, encompassing a gravel parking and lawn area used by the Applicants in front of their home.

[2] The Applicants were substantially successful on the application. They were granted an easement of vehicular ingress and egress over the driveway area marked on the filed survey that included a portion of the Respondents’ property, and the Respondents were ordered to remove items that interfered with or obstructed the Applicants’ use of the easement. The Applicants’ claim for adverse possession of the gravel parking and lawn area in front of their home that encroached on the Respondents’ property, however, was dismissed.

[3] The parties were unable to settle the issue of costs. They have both made written submissions setting out their positions in respect of same.

General Principles

[4] Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that an award of costs is in the discretion of the court.

[5] Rule 57.01(3) of the *Rules* provides that, when the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. Tariff A establishes the fees and disbursements that are allowable under Rules 57.01 and 58.05.

[6] Rule 57.01(1) sets out factors to be considered by the court in exercising its discretion to award costs, including:

- the result in the proceeding;
- any offer to settle or to contribute made in writing;
- the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- the amount claimed and the amount recovered in the proceeding;
- the complexity of the proceeding;
- the importance of the issues;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was: (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution;
- a party's denial of or refusal to admit anything that should have been admitted; and
- any other matter relevant to the question of costs.

[7] Rule 1.04(1.1) provides that, in applying the rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[8] Modern costs rules are designed to advance five main purposes: (1) to indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants; and (5) to encourage settlements: *Fong v. Chan*, 1999 CarswellOnt 3955, 128 O.A.C. 2 (Ont. C.A.), at para. 22; *394 Lakeshore Oakville Holdings Inc. v. Misek*, 2010 ONSC 7238, at para. 10.

[9] Ultimately, in fixing costs, the primary principles remain fairness, reasonableness and proportionality.

[10] As stated by the Ontario Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 26, when fixing costs, the calculation of hours and time rates is only one factor to be taken into account. The overall objective is “to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.” (See also *Zesta*

Engineering Ltd. v. Cloutier, 2002 CarswellOnt 4020, [2002] O.J. No. 4495 (Ont. C.A.), at para. 4.)

[11] Generally speaking, substantial indemnity costs will be awarded where there has been “reprehensible, scandalous or outrageous conduct on the part of one of the parties”: *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, at para. 43; *Bayford v. Boese*, 2021 ONCA 533, at para. 5.

Position of the Applicants

[12] It is the Applicants’ position that they were “entirely successful in obtaining the primary relief sought: unfettered access to their property and use of their driveway as their predecessors in title had done for decades prior to the Respondents’ attempt to unilaterally disrupt the *status quo* by force”.

[13] The Applicants seek their costs on a substantial indemnity basis (at a 90% rate) in the amount of \$61,654.97. The Applicants submit that the Respondents’ conduct was reprehensible, gave rise to the litigation, and continued during the course of the litigation. The Applicants sent various correspondence to the Respondents setting out their concerns and trying to find a way to resolve the issues between them collaboratively. They contend that they tried to propose reasonable solutions, but the Respondents refused them all and “doubled down on altering the *status quo*”.

[14] It is further submitted by the Applicants that:

Ultimately, the Respondents put *inter alia* armour stone directly on the property line (admittedly as a show of force), piled garbage onto their property line as close as possible to the Applicants’ home and front entrance thereto, and eventually built a portion of the fence directly on the property line despite conceding this was unreasonable to do.

To date, despite the decision of this Court, the Respondents have not removed any of the obstacles placed on their property line, i.e., our driveway.

[15] In the alternative, the Applicants seek their costs on a maximum partial indemnity basis – at a rate of 66% – in the amount of \$45,213.64.

[16] It is submitted that the Applicants’ costs are higher than the Respondents because they bore the onus of meeting the burden of proof, and incurred time contemplating, drafting and submitting written and verbal offers to settle the matter.

Position of the Respondents

[17] It is the position of the Respondents that there was divided success on the application and so it is appropriate that the parties each bear their own costs.

[18] The Respondents submit that the Applicants did not succeed in obtaining adverse possession of a prescriptive easement over the parking and lawn area in front of their home, they were not granted adverse possession of the land in dispute, and the easement ultimately ordered does not cover the entirety of the land in dispute. The majority of the Applicants' argument at the hearing was on the adverse possession claim.

[19] Alternatively, if costs are awarded to the Applicants, it is submitted that they should be reduced to reflect that the Applicants were unsuccessful on many issues and only partly successful on the issue of the easement.

[20] The Respondents contend that the costs claimed by the Applicants are excessive. A total of 186.10 hours of time is docketed among five lawyers and one paralegal. The Applicants have given no explanation for why that many lawyers were needed on a straightforward application or why the total hours spent were so high. There is also an unnecessary duplication of hours and work, for example, two lawyers billed for attending at the examinations.

[21] The Applicants' partial indemnity costs is more than double the Respondents' partial indemnity costs of \$17,064.87, all inclusive, with a total of 69.8 hours of time. The Respondents submit that they could not reasonably have expected the Applicants' costs would be so much higher than the costs they themselves incurred. The Respondents cite the decision in *Richard v. Niagara Falls*, 2019 ONSC 189 where the court fixed costs in the amount of \$18,139.48 in a similar adverse possession application where the steps taken were consistent with those taken here.

[22] The Respondents contend that substantial indemnity costs are not warranted. There were no rule 49.10 offers made. They dispute that the Applicants offered to purchase the disputed land, as asserted by the Applicants. The placement of the Respondents' compost pile and construction of a fence were in areas where the Applicants were held not to hold any rights. The Respondents submit that none of their actions were egregious misconduct that would attract elevated costs.

Analysis

[23] My first consideration is whether an award of costs on a substantial indemnity basis should be made. I do consider the Respondents' conduct in placing impediments along the boundary of the driveway, piling compost and land waste on their own property but in front of the Applicants' house, and proceeding to install a fence along the boundary between the two properties before the driveway/boundary issue had either been settled or otherwise resolved, to be most un-neighbourly and antagonistic behaviour. However, the Respondents' actions in these regards technically occurred on their own property. So, while it comes close, I am not persuaded that it crosses the line into the type of "reprehensible, scandalous or outrageous" behaviour that warrants substantial indemnity costs. Therefore, I will consider costs to the Applicants on a partial indemnity basis.

[24] Having said that, I am dismayed to read in the Applicants' costs submissions that the Respondents have not removed the obstacles placed on their property line adjacent to the driveway despite being ordered to do so by the court. There was no affidavit evidence filed attesting to this assertion, so I am not in a position to make a finding of fact in this regard. However, if it is true, the Respondents are in breach of a court order. Court orders must be complied with. If they are not

complied with, the party in breach can be held in contempt of court and serious consequences can flow from that.

[25] I do not agree with the Respondents that the case *Richard v. Niagara Falls* is similar in nature to this case. In that case, the only issue before the court was the applicant property owner's claim for adverse possession of a strip of property adjacent to the applicant's backyard. The land in question was previously owned by a railway and, along with other railway lands, had been transferred to the respondent city and turned into a public trail running east to west across the city. The former owner of the applicant's property had planted a line of trees roughly at the rear of his property overlooking the former railway strip of land. The court found that the city had been holding the disputed land for future use and intended to keep it available for the benefit and use of the public. The judge held that the planted trees formed a visual barrier at the south boundary of the disputed land and gave the impression that the applicant's property extended to the trees. The court also found that the former owner had occupied the backyard as if it did extend to the tree line. The court held that it was reasonable to infer that the tree line was planted by the former owner in order to deter the public from entering onto the subject land. The judge held that the evidence was insufficient, however, to prove that the city had been effectively excluded from possession of the land, and so the claim for adverse possession was dismissed. The Ontario Court of Appeal dismissed an appeal of the application judge's decision: see 2019 ONCA 531. Here, the Respondents were not taking steps to discourage members of the public from entering onto the lands at issue. They were intentionally positioning and placing items along the property line in order to prevent the Applicants, their neighbours, from being able to traverse the driveway as they and former owners of the Applicants' lands had for many years previously. Thus, I find *Richard v. Niagara Falls* to be distinguishable.

[26] In determining the amount of costs to be awarded, I have also considered the following factors:

- (a) It was reasonable and necessary for the Applicants to have brought the application.
- (b) The issues raised on the application were of importance to both parties.
- (c) The proceeding was of moderate complexity.
- (d) All of the relief sought by the Applicants at the hearing was not ultimately granted.
- (e) The hourly rates claimed by the Applicants appear to me to be reasonable.
- (f) While the majority of the work done on the file as undertaken by counsel for the Applicants appears to me to be reasonable, I do accept the submissions of the Respondents that it does not appear to have been necessary to have had 4-5 lawyers involved in the file. In my view, there also appears to be some duplication of legal work which the Respondents should not be responsible for paying.
- (g) More legal work was required to be completed by the Applicants in preparing and prosecuting the case than the Respondents in responding to it.

- (h) I find the Applicants' claimed disbursements, in the amount of \$726.42, to be reasonable and related to the litigation.
- (i) The Respondents could reasonably have expected to pay costs in the event of lack of success on the application.

[27] Considering the balancing exercise required under Rule 57.01, the guidance provided by the *Boucher* decision of the Ontario Court of Appeal, and the reasonable expectations of the parties as indicated by their respective bills of costs, I am satisfied that awarding partial indemnity costs to the Applicants, payable by the Respondents, in the amount of \$36,000.00, inclusive of HST and disbursements, is fair, reasonable and proportionate in the circumstances. Costs are payable within 30 days.

Disposition

[28] For the foregoing reasons, this court orders that the Respondents pay costs to the Applicants fixed in the amount of \$36,000.00, all inclusive, payable within 30 days of the release of these reasons.

MacNEIL J.

Released: August 26, 2025