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Docket: CI 18-01-17082
(Winnipeg Centre)
Indexed as: 6165347 Manitoba Inc. et al.
v. The City of Winnipeg et al.
Citation: 2025 MBKB 149

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

6165347 MANITOBA INC. and 7138793 MANITOBA LTD, plaintiffs,	)	Dave G. Hill Kevin D. Toyne for the plaintiffs
- and -	)	
THE CITY OF WINNIPEG, JOHN KIERNAN, BRADEN SMITH, MICHAEL ROBINSON and MARTIN GRADY, defendants.	)	Nicole K. Beasse Mark Intertas for The City of Winnipeg Thor J. Hansell Danielle A. Barchyn for John Kiernan Brian J. Meronek, K.C. Jeremy W. McKay Katie Olson for Braden Smith Kevin T. Williams, K.C. J. Matthew Nordlund for Michael Robinson Michael G. Finlayson Gabrielle C. Lisi for Martin Grady JUDGMENT DELIVERED: December 8, 2025

McCARTHY J.

INTRODUCTION

[1] This decision relates to costs payable by the Plaintiffs for proceedings up to and including trial in the Court of King's Bench.

[2] At trial the Plaintiffs, 6165347 Manitoba Inc. and 7138793 Manitoba Ltd. (the "Plaintiffs"), were successful against the Defendants Braden Smith ("Smith"), Michael Robinson ("Robinson"), and the City of Winnipeg (the "City"). The claims against John Kiernan ("Kiernan") and Martin Grady ("Grady") were dismissed. (For ease of reference in this decision I will refer to the Defendants, other than the City, by name or as the "individual Defendants".)

[3] Subsequent to the trial decision, the Manitoba Court of Appeal allowed the appeals of Smith, Robinson and the City, set aside the decision of the trial court, and dismissed the Plaintiffs' claim in its entirety. The Court of Appeal also ordered the Plaintiffs to pay costs in that court and the court below.

[4] By way of background, the Plaintiffs' claim was for the tort of misfeasance in public office against the City and four employees of the City. The claim was set for trial for eight weeks and there were at least 13 counsel at trial. The City, who was represented by its in-house counsel, conceded at the outset of trial that if any of the individual Defendants were found liable the City was vicariously liable as the employer.

[5] Prior to trial there was an unsuccessful motion made by the Plaintiffs to the pre-trial Judge (not the trial Judge in this case). That ruling prohibited the Plaintiffs from relying upon an expert report on damages at trial.

[6] In addition, at the outset of trial, the Defendants objected to Answers to Undertakings provided very late by the Plaintiffs and brought a motion to dismiss the Plaintiffs' claim in its entirety, or in the alternative, to exclude all documentary evidence included in those Answers from being relied upon at trial. That motion by the Defendants was largely unsuccessful with the court declining to dismiss the claim and disallowing only a small portion of the late disclosure from being relied upon at trial.

[7] Also, at the outset of trial the Plaintiffs sought to amend their pleadings to allege an earlier date for the commencement of the alleged malfeasance. That motion was granted.

[8] As a result of the motions at the outset of trial, the Defendants were granted an adjournment for four days to review and examine on the late disclosure and Amended Statement of Claim.

[9] The trial commenced at the beginning of the second scheduled trial week and lasted for the seven remaining weeks.

[10] The Plaintiffs' initial claim was for $30 million, but at the outset of trial the Plaintiffs reduced their claim to $17.9 million.

[11] The Defendants Smith, Robinson and the City appealed the trial decision and were successful.

[12] The parties, having been unable to agree upon costs, set the matter down for hearing. The City also brought a motion seeking an order that any cost awards also be made payable by Andrew Marquess ("Marquess") personally, as a principal of the corporate Plaintiffs.

[13] At the contested costs hearing, the parties advised that they were not seeking that the court set the amount of costs payable, but rather, that the court determine the appropriate type of costs payable, to whom, and by whom.

ISSUES

[14] The specific issues for determination in this decision are:

(1) Whether Tariff, solicitor-client, or elevated costs are appropriate;

(2) The number of sets of costs to be awarded;

(3) Whether costs should be payable by Marquess personally; and

(4) When costs should be payable.

The Appropriate Level of Costs

[15] The Plaintiffs argued that only one set of Tariff costs should be awarded or, in the alternative, elevated costs should be set at 1.5 or 2x Tariff.

[16] The individual Defendants are each seeking costs on a solicitor-client basis, or in the alternative, elevated costs, or Class 4 Tariff costs for two trial counsel each.

[17] The City is seeking Tariff Costs.

[18] The court has broad discretion to set costs pursuant to section 96(1) of ***The Court of King's Bench Act***, C.C.S.M. c. C280, and the inherent jurisdiction of the court. In addition to providing a Tariff, the Manitoba, ***Court of King's Bench Rules***, M.R. 553/88, list several factors that the court may consider in setting costs.

[19] Those factors set out in King's Bench Rule 57.01(1) are as follows:

Factors in discretion

57.01(1) In exercising its discretion under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

(a) the amount claimed and the amount recovered in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;

(d.1) the conduct of any party which unnecessarily complicated the proceeding;

(d.2) the failure of a party to meet a filing deadline;

(e) whether any step in the proceeding was improper, vexatious or unnecessary;

(f) a party's denial or refusal to admit anything which should have been admitted;

(f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;

(g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and

(h) any other matter relevant to the question of costs.

[20] The overriding premise of any cost award is that it must be fair and reasonable (see ***WSIB Investments (Infrastructure) Pooled Fund Trust et al. v. Plenary Group (Canada) Ltd. et al.***, 2025 MBKB 73 (CanLII), at para. 12).

Solicitor-Client Costs

[21] With respect to solicitor-client costs, the Defendants argued that the Plaintiffs should be liable for fully indemnifying the individual Defendants for their actual costs in

defending claims which they argued were obviously without merit. They argued that the allegations of misfeasance before the court were both serious and akin to allegations of fraud and were seriously prejudicial to the character and reputation of the Defendants. It was their position that the Plaintiffs pursued this claim in bad faith knowing that there was no merit to the claim and no evidence to support their allegations.

[22] The Defendants also argued that the conduct of the Plaintiffs in making statements to the media with respect to their claims of misfeasance was inappropriate and harmful to the reputation and integrity of the individual Defendants. They argued that some of the allegations in the pleadings, which were drawn to the attention of the media, were without any factual foundation and should be sanctioned through an award of solicitor-client costs. Additionally, Smith argued that solicitor-client costs were appropriate to sanction the conduct of the Plaintiffs in reporting him to his professional regulator and failing to withdraw that complaint.

[23] The Defendants relied upon ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited***, 2021 MBQB 101 (CanLII) (at paras. 63-66) for the proposition that where a party makes unsubstantiated and unfounded allegations of fraud or unlawful conduct, or other allegations of improper conduct seriously prejudicial to the character or reputation of a party, an award of solicitor-client costs may be warranted.

[24] They also relied upon ***CMT et al. v. Government of PEI et al.***, 2019 PESC 40 (CanLII), where the court found a complete absence of any merit to the Plaintiff's allegations and dismissed the claims on summary judgment, and ***Payne v. Corp. of the***

City of Windsor, 2012 ONSC 4728 (CanLII) (at para. 46), where the court found that the allegations "brought into question the integrity, honesty and credibility" of the defendants and "unfairly besmirch their personal and professional reputations". In both cases the court found that substantial indemnity costs were warranted.

[25] The Plaintiffs, on the other hand, agreed that unsuccessful allegations akin to fraud could warrant an award of solicitor-client costs, but argued that the bar for an award of full indemnity costs is a very high bar and such circumstances should be rare.

[26] The Plaintiffs relied upon ***Ultracuts v Magicuts***, 2024 MBCA 45 (CanLII), where the Manitoba Court of Appeal stated (at para. 12):

> …solicitor and client costs should not be the rule but should be awarded only in rare and exceptional circumstances.

[27] And (at para. 14):

> It is clear from these decisions that unsuccessful claims of fraud or dishonesty do not necessarily lead to an award of solicitor and client costs; rather, such awards should be rare and exceptional (see *Brown & Root* at para 113; *Bibeau* at para 89). For example, as stated in *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9 at para 26, while an unsuccessful attempt to prove fraud or dishonesty does not necessarily lead to an order of solicitor and client costs against the unsuccessful party, they would be appropriate where the unsuccessful party had information that the other party was neither dishonest nor fraudulent, but merely negligent.

[28] The Plaintiffs argued that this was not a situation where they proceeded with a claim in bad faith or that they knew to be entirely unmeritorious, pointing out that they were in fact successful against three of the five Defendants at trial. It was their position that there was also no conduct by the Plaintiffs during the litigation which warrants solicitor-client costs.

[29] In my view, the facts of this case are different than those in ***CMT*** and ***Payne*** where the courts found the claims to be completely without merit.

[30] In this case I am not persuaded that the Plaintiffs were guilty of bad faith in alleging misfeasance against the Defendants even though they were not ultimately successful. The evidence of Marquess, and his consulting planners, at trial suggested that they held an honest belief based upon their experience in the matter and their reading of the internal documents of the City Planning Department, that the Defendants in this case had intentionally and improperly conducted themselves in the handling of the Plaintiffs' development applications. And, while the Court of Appeal took a different view of the evidence, from an objective basis, it is difficult to find that the allegations, particularly against Smith and Robinson, were entirely without merit when the Plaintiffs were successful at trial against those Defendants. Even where the claims were not successful against Kiernan and Grady in arriving at that decision, the court did not find the claims were entirely without any evidentiary basis. Rather, the finding was that the evidence was not sufficient to satisfy the high threshold for proving misfeasance in public office. I am not satisfied that this claim was so clearly unmeritorious that the Plaintiffs should be sanctioned for proceeding with it.

[31] The threshold for awarding solicitor-client costs is high, requiring conduct that is either scandalous, outrageous or reprehensible. (***Ultracuts***, at para. 15; ***Bibeau et al v Chartier et al***, 2022 MBCA 2 (CanLII), at para. 102; and ***West v. West***, 2007 MBCA 62 (CanLII), at para. 4; citing ***Young v. Young***, 1993 SCC 34, at p. 134)

[32] Further, as stated by the Manitoba Court of Appeal in ***Ultracuts***, solicitor-client costs do not follow automatically from a failure to prove fraud or dishonesty, the court must also find that the unsuccessful party's conduct was scandalous, outrageous or reprehensible in all of the circumstances of the case to justify an award of solicitor-client costs (***Ultracuts***, at para. 15; and ***Manitoba Keewatinowi Okimakanak Inc. v. McIvor***, 2007 MBCA 134 (CanLII), at para. 8).

[33] An unsuccessful claim for misfeasance in public office does not automatically warrant an award of full indemnity costs.

[34] I also do not find the Defendants arguments that, in addition to being unsuccessful, false and/or harmful allegations made by the Plaintiffs to the media warrant solicitor-client costs. Cost sanctions generally arise out of the litigation conduct of a party. And while there may be some exceptions, such as where there has been a breach of fiduciary duty (see ***Re Parkinson Estate***, 2024 MBCA 52 (CanLII), at para. 119), there was no such relationship or conduct here.

[35] In this case the Plaintiffs were engaging in the public court system which operates on an open-court principle. They also chose to publicly announce that a claim had been issued, and they were interviewed on several occasions. The allegations made publicly mirrored the allegations in their Statement of Claim. Even if they had not done so, it is likely that the media would have reported on the proceedings.

[36] Particular concerns were raised with respect to the Plaintiffs' allegation that Kiernan, as the Director of PPD, had admitted wrongdoing by Grady which Kiernan and Grady both submit was blatantly false. With respect to this allegation, the interpretations

of the evidence differ, but there had been some recognition by Kiernan that the position taken by Grady was not correct and Grady's decision was reversed by the City shortly after it was made. Similarly, Robinson argued that calls for termination of his employment following release of the court's trial decision had serious repercussions and should be sanctioned with costs.

[37] With respect to these reports, while I acknowledge that media coverage is stressful and adds to the impact of the allegations, I am not satisfied that the public statements of the Plaintiffs in this case warrant solicitor-client costs. In particular, it would be inappropriate to levy increased costs against a party on the basis of reporting arising out of a decision of the court. Public and political commentary on decisions of the court are part of the open-court process.

[38] With respect to allegations in the Statement of Claim, I do find that some of the allegations pursued at trial went beyond even a very generous interpretation of the evidence. Pursuing those claims was litigation conduct that should be considered for the purposes of costs, but in my view do not rise to the level of scandalous or outrageous or reprehensible.

[39] I am also not prepared to award punitive costs because the Plaintiffs made a concurrent complaint to a professional regulator. Whether or not a professional complaint was warranted is not within the purview of the court on this claim, and I am not satisfied that it demonstrates bad faith with respect to the claims before the court.

[40] I am not satisfied that this case warrants an award of solicitor-client costs.

Elevated Costs

[41] In ***Ultracuts*** (at para. 17), the Manitoba Court of Appeal found that where the circumstances do not rise to the level of attracting solicitor-client costs, they may still lead to an award of elevated costs.

[42] Having considered the criteria set out in King's Bench Rule 57.01(1), I make the following observations.

[43] First, the Plaintiffs' claim was for damages in the amount of $30 million, which was reduced to $17.9 million at the outset of trial. This was a very significant claim which warranted a robust defence and required a lengthy trial. Such a claim would have been very daunting for the individual Defendants and would have had serious implications for their employment. The public nature of the claim would have exacerbated those effects.

[44] This claim was also complex in the sense that the factual allegations spanned several years and involved large volumes of disclosure and extensive examinations for discovery. It also involved conflicting opinions from several participant experts at trial.

[45] The issues were important to both parties. The Plaintiffs were claiming very extensive financial losses as a result of the delays which they attributed to misconduct by the Defendants. The outcome had significant implications for the finances, reputations and employment of the individual Defendants. There were also implications for the City, which was responsible for the policies, practices and oversight of the City Planning Department, and for the public, which relies on those services. Overall, the implications were probably most significant for the individual Defendants.

[46] With respect to the conduct of the parties that tended to lengthen or shorten the proceedings, in my view all parties acted reasonably and made best efforts to have the matter proceed efficiently within the trial process. I agree that the last-minute amendments and disclosure by the Plaintiffs caused some delay, but it was not significant in the overall scheme of the litigation. There was also some lengthening of the proceedings through the involvement of separate counsel for each Defendant, which will be addressed in more detail below.

[47] There was no litigation conduct of the Plaintiffs which I find was improper, unnecessary or vexatious, except that after disclosure and examinations, the Plaintiffs should have withdrawn their allegations with respect to such things as obstruction of FIPPA applications and improper direction to the police for which there was very little evidence other than speculation and hearsay from Marquess. While these allegations did not add substantially to the length of the trial, they certainly would have impacted the stress and reputational impacts of the claim on the individual Defendants.

[48] With respect to the conduct of the Defendants, in my view it is relevant that this claim for misfeasance was only commenced after the court granted an injunction against the City requiring them to hear the Plaintiffs' planning applications. The City was also found in contempt of that court order on two occasions.

[49] With respect to the relative success of the parties, the Defendants were wholly successful, and the Plaintiffs' claim of misfeasance was dismissed in its entirety after appeal.

[50] Smith argued that the court should also consider that he made an offer to settle to the Plaintiffs on May 4, 2020. His offer was that he would agree to dismissal of the Plaintiffs' claim against him without costs. I agree that, given the outcome, this should be reflected in the cost award.

[51] Overall, notwithstanding that I did not find an award of solicitor-client costs to be appropriate in this case, it is clear to me that the above considerations militate in favour of elevated costs.

[52] Even where a Plaintiff proceeds in good faith, they bear the risk of paying significant costs if their claim is unsuccessful, particularly where the case is lengthy and complex and involves serious allegations of misconduct of public officers in the performance of their professional duties. In this case, the evidence to support a finding of misfeasance against Kiernan was particularly weak. The trial decision points out that the evidence in fact suggested that, if anything, he had made efforts to assist in moving the planning applications forward. Similarly, with respect to Grady, while his involvement had the effect of slowing down the planning process, I found that at worst he was wrong in the position he took in refusing to accept the DASZ application. And with respect to Smith and Robinson, the Court of Appeal found that their conduct was not improper and could not be construed as misfeasance in public office. There is no question that there would have been significant stress, prejudice and damage to the Defendants' reputations in having to defend claims of this nature over a period of several years, and through several weeks of trial. The decision by the Plaintiffs to pursue those claims resulted in

considerable legal and professional cost and as a result, increased the liability of the Plaintiffs for costs.

[53] In light of the above analysis, I find that costs above Tariff are appropriate in this case, however, that finding must also be considered in conjunction with the issue of whether a cost award is payable to each Defendant.

Should Separate Costs be Payable for each Defendant?

[54] The Defendants argued that each Defendant required and was entitled to be represented by separate counsel, and that whatever level of costs the court determines are appropriate should be awarded to each Defendant.

[55] They argued that separate counsel were required due to the serious nature of the allegations and the possibility that conflicting positions, evidence, or defences could have arisen in defending the claim against each individual Defendant.

[56] No actual conflicts were identified and no argument made that one team of counsel could not have represented the interests of all Defendants given the way the evidence and issues actually unfolded. Rather, counsel argued that they had to be free to pursue all potential defences on behalf of each Defendant, and that if any conflicts had arisen they could have resulted in delay or prejudice.

[57] The Plaintiffs did not dispute that each Defendant was entitled to be represented by counsel of their choice, but argued that in this case, independent counsel was not necessary given that there were no Crossclaims or actual conflicts and separate representation added to the length, complexity and cost of the trial. They argued that multiple cost awards were not reasonable in the circumstances.

[58] Some of the cases relied upon by the Defendants stand for the principle that defendants are not required to use one counsel, however, there is no indication in those cases that the court considered whether independent counsel was necessary (see ***Samulian v Attrell Auto Holdings Ltd.***, 1994 CarswellBC 718; citing ***Rogers v. Davis, et al.***, 1932 SCC 10; and ***Keystone Shingles & Lumber Ltd. v. Royal Plate Glass & General Insurance Co. of Canada et al.***, 1956 CanLII 301 (BC CA)). In other cases the court concluded that the claims, and the interests of the defendants, were such that independent counsel was necessary (see ***Giles v. Westminster Savings Credit Union***, 2008 BCCA 62 (CanLII) and ***Blaze Energy Ltd v Imperial Oil Resources***, 2014 ABQB 509 (CanLII)).

[59] What is clear from the many cases filed is that the setting of costs is both discretionary and fact specific. The aim is to set an amount that is fair and reasonable (***WSIB***, at para. 12) and that bear some recognition of the reality of the actual costs incurred (***The Manufacturers Life Insurance Company (formerly North American Life Assurance Company) v. Pitblado & Hoskin et al.***, 2008 MBQB 11 (CanLII), at para. 16).

[60] The ***Payne*** decision, as an example, involved a claim with multiple causes of action including negligence, malfeasance, malicious prosecution, abuse of process and ***Charter*** claims against multiple different government departments and individuals. The court in that case found that there were different routes to potential liability for two groups of defendants, and therefore it was reasonable for those defendants to have separate representation. The court also commented that theoretically each defendant was entitled

to be separately represented and that the Plaintiffs were lucky that they were facing only two sets of costs (at para. 6). However, after finding that costs approaching full indemnity were warranted in the circumstances, the court went on to find that the magnitude of such an award would not have been fair and reasonable for the Plaintiffs, particularly because they would be paying two sets of costs. The court reduced the cost award as a result, citing proportionality (at para. 39).

[61] In the case before this court, there was one cause of action related to the conduct of four employees in the City's Planning, Property & Development Department. Although the claim spanned several years, it related to a single proposed development. The legal test and principles relating to the tort of misfeasance in public office were agreed upon by all Defendants, and the defence of each of the individual Defendants, while specific to the factual involvement of the particular Defendant, was legally the same. Their positions were identical on the issue of damages.

[62] In this case there were no Crossclaims made between any of the Defendants and no conflicting positions taken on any procedural or substantive issues. None of the Defendants alleged that there was any conduct or misfeasance by any of the other Defendants that caused delay or harm to the Plaintiffs, and none of the Defendants called or presented any evidence that contradicted the position of any other Defendant. Further, in an effort to avoid duplication, individual Defendants frequently relied upon parts of examinations conducted by other counsel, and upon oral and written argument presented by other Defendants, as equally applicable to their defence.

[63] In my view it would have been quite possible in this case for one team of counsel to have initially reviewed all disclosure and identified the involvement of each of the Defendants. If a conflict in the evidence or the positions of the Defendants had been identified during that process, independent counsel may have become necessary. Instead, from the outset of this action, in-house counsel for the City was involved and each of the individual Defendants retained independent counsel before any potential conflict was identified.

[64] While I accept that this was a very significant and serious claim, and that it was open to the parties to retain separate counsel, that does not mean that if unsuccessful the Plaintiffs are automatically required to pay five separate cost awards. In fact, before deciding whether elevated costs are warranted, or finding that multiple cost orders are appropriate, the court is encouraged pursuant to King's Bench Rule 57.01(1)(g) to consider whether there were parties with identical interests who were unnecessarily represented by more than one counsel.

[65] With respect to the City, they could have agreed to be bound by the outcome, as they ultimately did, without the need for separate representation. There was no separate position or interest being defended by the City, and at trial it conceded vicarious liability if any of its employees were found liable. The role of counsel for the City at trial was nominal, which the City acknowledged to some degree by requesting only Tariff, rather than increased costs.

[66] I have no difficulty in finding that there was no necessity for the City to have separate representation in this matter, and as a result no separate award of costs should be made for legal expenses incurred by the City in defence of this claim.

[67] In this case, voluminous documentary evidence relating to the claim came from City records and each team of counsel reviewed and relied upon the same documentary evidence in response to the allegations. I am satisfied that the decision of the individual Defendants to each be represented by separate legal counsel contributed to the expense, complexity and length of the trial. While efforts to avoid duplication were appropriately made at trial, and may have served to reduce trial time somewhat, the reality remained that there were five teams of counsel involved, who each separately incurred the cost of reviewing all disclosure, attending at examinations, pre-trial conferences and motions, and preparing for and attending at several weeks of trial. Also, different counsel will always have different approaches and will ask additional questions and raise additional issues as a result.

[68] While I accept that the allegations here were very serious, I am not persuaded that the cost of separate representation should be heavily borne by the Plaintiffs in this case.

Conclusion as to Costs Payable

[69] Costs are intended to fairly compensate successful parties for their legal expenses and to deter unmeritorious litigation. However, consideration must also be given to whether a cost award is fair and reasonable where a claim is unsuccessful, but completely devoid of merit.

[70] The challenge in this case is that I am satisfied that the nature and amount of the claim, and the length and complexity of the action warrant costs above Tariff, however, I am not satisfied that an award of elevated costs to five separate teams of counsel is appropriate.

[71] First, for the reasons set out above, I am not awarding any costs for legal expenses incurred by the City on its own behalf.

[72] With respect to the individual Defendants, the evidence in this case is that the actual legal costs incurred by each ranged from $303,852 to $670,143. The total costs incurred, not including the City's legal costs, were $2,175,995.

[73] With respect to Tariff costs, the Bill of Costs provided by the Defendants ranged from approximately $160,000 to $190,000, including taxes, but excluding disbursements.

[74] Having considered various options, I am not prepared to set costs as a percentage of actual expense incurred given my concerns that the involvement of multiple independent counsel caused excessive expense. I am also of the view that 1.5 or 2x Tariff is not a sufficient award with respect to a claim of this amount and involving serious allegations that no doubt had a significant impact on the Defendants beyond exposure to damages.

[75] In the circumstances, I am setting the costs at $800,000 (plus applicable taxes and reasonable Tariff B disbursements). As the City has indicated that it is covering the legal expenses of the individual Defendants, I would expect that it is not necessary to break that award down any further. However, if it is, and counsel are unable to agree

on an allocation of costs between the Defendants, I would set the award at $210,000 payable to each of Smith and Kiernan, $200,000 to Robinson and $180,000 to Grady.

[76] I have set a specific cost amount in an effort to avoid the need for any further contested proceedings.

[77] This award is intended to take into account the fees actually incurred relative to one another, and compensation for expenses incurred with respect to all pre-trial motions.

[78] With respect to the late Answers to Undertakings, the costs of reviewing and examining on same was largely born by Kiernan as his counsel took the lead on that matter. There is no question that the lateness of the disclosure was inappropriate and that it added to the legal expenses of the Defendants, however, it did not result in any delay in completing the trial, which was a concern when the ruling was made. Further, at the end of the day, damages were not awarded based upon that disclosure, so there was no prejudice to the Defendants in its admission. In my view the cost award set out above adequately addresses costs associated with those motions.

[79] An earlier motion before the pre-trial conference Judge, where the Plaintiffs were seeking to rely upon a late expert report, was unsuccessful and did not result in any delay of the trial or prejudice to the Defendants. Compensation for attendance at that motion is included in the Tariff costs calculated by each Defendant and included in this award.

[80] As a final note, the City advised that it was covering the legal expenses incurred by all Defendants and argued that the Plaintiff should pay costs for all Defendants to ensure that the costs of this litigation were not borne by taxpayers. In my view, that is

not a valid consideration in setting costs. Similarly, the fact that the individual Defendants are not paying their own costs has no bearing on my assessment of appropriate costs. The fact that the City was covering the costs was only factored into how I have structured the cost award as set out above.

Non-Party Liability for Costs

[81] On June 12, 2025, the City filed a Notice of Motion seeking an order that Marquess be determined to be the real litigant behind this claim and requiring him to pay costs personally.

[82] This motion was heard in conjunction with the contested hearing on costs on June 19, 2025. None of the Defendants' pleadings raised this issue in the Court of King's Bench, nor was it raised before the Court of Appeal. This issue was also not raised by the Defendants Grady or Kiernan who were successful at trial.

[83] Counsel for the Plaintiffs, on behalf of Marquess, argued that this court lacked jurisdiction to make the order sought by the City on the basis that they did not give adequate notice of this motion, did not seek an order for costs against Marquess personally in their Statement of Defence, and did not issue a Third Party Claim against Marquess. They also argued that the Court of Appeal did not award costs against Marquess personally when directing this court to set costs.

[84] It is the position of Marquess that the lack of notice results in significant prejudice to him, and that such an order is not appropriate in this case.

[85] With respect to the jurisdictional argument, this issue also arose in ***1318847 Ontario Limited v. Laval Tool & Mould Ltd.***, 2017 ONCA 184 (CanLII), where the

court held (at para. 79) that, "as a matter of procedural fairness, non-parties must be given notice of a litigant's intention to seek a costs award against them". In that case the Ontario Court of Appeal found that notice of two months was not adequate.

[86] In this case, the City brought a motion for an order of costs against Marquess less than three weeks prior to the date for hearing of the cost motion. By that time, this matter has been proceeding before the court since 2018 with no allegations made by any of the Defendants in the formal pleadings, or at any other stage in the proceedings; that either of the Plaintiffs were sham corporations, or were being used in an improper manner. The action had already proceeded through extensive disclosure and examinations, seven weeks of trial, and an appeal without any indication of the City's intention to seek costs personally against the principal of one of the corporate Plaintiffs.

[87] The result of bringing such a motion at this stage in the proceedings is considerable prejudice to the non-party's ability to garner evidence relevant to this issue and to make informed decisions from his personal perspective, rather than as the principal of a corporate Plaintiff, with respect to potential personal liability for costs.

[88] While I agree with the City's submission that the purpose of a cost award is to indemnify a successful litigant and discourage frivolous claims, those considerations cannot override the right of litigants, and even more so, non-parties and corporate principals to make litigation-related decisions with knowledge that they could have personal exposure for costs.

[89] In my view, the notice here was inadequate and it would be procedurally unfair and prejudicial to Marquess to make the order sought by the City at this stage in the proceedings.

[90] In addition to the lack of notice, I am also not satisfied that this is an appropriate case for an order of costs against Marquess personally.

[91] I would agree that the court has inherent jurisdiction and discretion to award costs against a non-party, which has been used from time to time. For instance, in ***B.J. Kennedy Agency (1984) Limited. v. Kilgour Bell Insurance Agencies Limited***, 2000 MBQB 26 (CanLII) (at para. 12), McCawley J. determined that it was appropriate to order costs against both the corporate plaintiff, and the directing mind of the corporation personally.

[92] Costs against a non-party may be appropriate where the non-party is using a nominal plaintiff, or a person of straw, to carry on litigation in which the non-party is the true plaintiff, and is doing so simply to avoid personal liability for costs.

[93] The test set out in ***Conversions by Vantasy Ltd. et al. v. General Motors of Canada Limited***, 2003 MBQB 263 (at para. 31), is that the court should exercise its discretion to order costs against non-parties where it determines: that the non-party had status to bring the action; that the plaintiff was not the true plaintiff; and the plaintiff was a "man of straw" put forward to protect the true plaintiff from liability for costs.

[94] In ***Vantasy***, the court concluded (at para. 32):

> It is true that Conversions and Vantasy Limited had no assets but they were not "men of straw" as that term has been used in the case law. It cannot be said that these companies were put forward simply to avoid costs for the "real litigant".

[95] Similarly, the Ontario Court of Appeal in ***Laval Tool*** provided a detailed analysis of the "person of straw" test and stated that the primary question for the court to determine is whether (at para. 61):

> …*intention, purpose or motive* of the non-party in putting the named party forward was *to avoid liability for costs*.

[96] In my view, both ***Vantasy*** and ***Laval Tool*** stand for the proposition that costs should only be awarded against a non-party where it is clear on the facts of the case that the purpose of using the plaintiff to litigate was to avoid costs.

[97] Further, with respect to when it is appropriate to order costs against a non-party who is a principal or directing mind of a corporate plaintiff, the reasoning in ***Laval Tool*** is very helpful and is consistent with the legal principle that corporations and their principals are separate legal entities. The court stated that the (at para. 63):

> jurisdiction to order non-party costs does not allow the court to award costs against a corporate officer, director, shareholder or principal of the corporation merely because that person caused the Corporation to commence litigation as the named party or because the corporation is without assets: see Rockwell, at P. 212 oh. R.; Television real estate, at P. 2990. R.; Atlantic financial Corp. the Henderson (207), 80 60. R. (3D) 121, 2000 70. J. And L. 2126 (S. C. J.), At para. 14; and Anchorage, at para 27. As put by Veit G in care and Richard sports Inc. the Fulton, 1990 2A. J. And L. 869, 133A. R. 382 (Q. B.), at para 14:
>
> > [O]rders for costs may not be made against the principals of corporations if the only evidence is that those principals directed the operations of the corporation. Our system recognizes the legitimacy of corporations as legal entities; one legitimate purpose of such vehicles is to shield its principals from [page658] personal liability. In order to fix principals with liability, a court is required to find much more than the usual and necessary pattern of principals who direct the affairs of the corporation.

[98] And further, the court stated (at para. 64):

> …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 S. 131(1) of the *CJA*, but put someone else forward to avoid costs consequences.

[99] In order to determine whether costs against a non-party are appropriate, the court must make a factual determination about whether the non-party is the real litigant, and is only using the named party as a shield, or as a person of straw, in an effort to escape liability for costs. Something more than an argument that the principal should be personally liable merely because he caused the corporation to commence litigation, or because the corporation has, or may have, inadequate assets to satisfy a cost award is required.

[100] In this case, on the evidence available, I am not satisfied that Marquess caused 6165347 Manitoba Inc. to bring litigation on his behalf, solely as a means of insulating himself from potential liability for costs. The evidence was that at all relevant times the corporate Plaintiffs were the legal titleholders of the Parker lands, and there was no evidence that there was anything out of the ordinary with respect to Marquess using a corporation to take title to and develop the Parker lands. Marquess testified that he used corporations in all of his development projects. As identified by the court in ***Laval Tool***, there are many legitimate reasons for using a corporation for business transactions that do not include avoiding liability for costs (at para. 62).

[101] The facts here are also quite different than those in ***B.J. Kennedy*** where the court found that land and buildings owned by the corporate plaintiff had been transferred to the directing mind of the corporation during the course of the legal proceedings, leaving the corporate plaintiff effectively without assets. Here, there is no allegation or

evidence that Marquess transferred, or took any steps to transfer assets out of the Plaintiffs' corporations during the course of the litigation.

[102] Other than the description by Marquess of 6165347 Manitoba Inc. holding title to the Parker lands as a bare trustee, and the fact that there are mortgages registered against the Parker lands, there is also insufficient evidence upon which to find that the property and assets of the corporate Plaintiffs would not be sufficient to satisfy a cost award, as argued by the City. There was no evidence before the court as to the value of the Parker lands after they are developed, or the value of the Plaintiffs' LVAC claim with respect to land expropriated from the Parker lands. There was no evidence at all with respect to the corporate Plaintiff, 7138973 Manitoba Ltd., and its ability to pay costs. There are also some funds currently held in trust as security for costs; an issue that was dealt with in advance of trial.

[103] Further, even if there was evidence that proved that the Plaintiffs will be unable to fully satisfy a cost award, that alone is not a sufficient basis upon which to order costs against a non-party (see ***Laval Tool***, at para. 63). The onus is on the City to satisfy the court that Marquess was the true Plaintiff and that 6165347 Manitoba Inc. was used as a named Plaintiff solely to shield Marquess from costs. The City has not satisfied that onus.

[104] The City's motion for an order of costs against Marquess personally is dismissed.

When are the Costs Payable?

[105] The Plaintiffs argued that payment of the award of costs in this case should be delayed until after determination of the Plaintiffs' application for leave to appeal to the

Supreme Court of Canada. They argued that they were not seeking a stay from this court, but rather an order that costs are payable at a later date rather than forthwith.

[106] The Defendants argued that the request was effectively a request for a stay and that there was no notice of this request or basis upon which to grant it.

[107] This issue was not addressed in the Court of Appeal decision.

[108] In my view, the Plaintiffs are effectively asking for a stay of enforcement of the cost award, without proper notice.

[109] Further, with respect to any potential prejudice to the Plaintiffs, with an institutional payee like the City, there should be no reason for concern about having costs reimbursed if this decision is later overturned or varied. Even if there had been proper notice, I am not persuaded that there is any compelling reason, or evidence, to support a finding that payment of costs should be deferred until after the leave or appeal process. In the normal course, a successful party is entitled to their costs immediately upon endorsement of a cost order. In this case I do recognize that this is a significant cost order and that arrangements will need to be made for payment of same. Costs will therefore be payable within 45 days of this decision, and any unpaid portion will bear interest at the Court of King's Bench rate thereafter.

_____ J.