CITATION: HMK v. Temagami Barge Ltd. et. al., 2026 ONSC 1196
COURT FILE NO.: CV-09-4721
DATE: 26/02/2026

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: His Majesty the King in Right of Ontario as represented by the Minister of Natural Resources, Plaintiff

AND:

Temagami Barge Limited, The Estate of Raymond Joseph Delarosbel, Deceased by his Estate Trustee Patricia Delarosbel and Clifford Foster Lowery, Defendants

BEFORE: The Honourable Justice David Nadeau

COUNSEL: *E. Machado,* for the Plaintiff

C. R. Aiello, for the Defendants Temagami Barge Ltd. and Raymond Joseph Delarosbel (collectively TBL)

J. Madhany, for the Defendant Clifford Foster Lowery

HEARD: By written submissions.

ADDENDUM ON COSTS

[1] Pursuant to my Decision on Motions released on December 15, 2025, I have received and considered the Costs Outline and Costs Submissions of Ms. Machado both dated January 9, 2026, and the Costs Submissions of Mr. Aiello dated January 20, 2026. On behalf of his client, as he did for my two latest Addendum on Costs from November 24, 2023, and December 31, 2024, Mr. Madhany chose not to file written submissions since the defendant Mr. Lowery is not seeking costs from any party and no party is seeking costs from him either on these interim motions.

[2] Counsel for the plaintiff seeks its substantial indemnity costs for both these motions in the amount of $30,336. Counsel for the defendant TBL submits that there should be no costs of either motion awarded to the plaintiff. In the alternative, if any costs are awarded to the plaintiff it should be on a partial indemnity scale, and it is submitted the quantum claimed is grossly excessive. I will not repeat in detail the written submissions from these experienced Counsel since they are relatively brief.

[3] I agree that, in assessing costs, the Court "is required to consider what is "fair and reasonable" having regard to what the losing party could have expected the costs to be": *Pack v. Cord Blood Bank of Canada Inc.*, 2023 ONSC 3227, at para. 11.

[4] This Court's exercise of discretion for costs determinations is founded in s. 131 of the *Court of Justice Act*:

> "the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid."

[5] Costs awards are "quintessentially discretionary.": *Restoule v. Canada (Attorney General),* 2021 ONCA 779, at para. 344, relying on *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, at para. 126.

[6] Traditionally, the purpose of an award of costs within our "loser pay" system was to partially or, in some limited circumstances, wholly indemnify the winning party for the legal costs it incurred. However, costs have more recently come to be recognized as an important tool in the hands of the court to influence the way the parties conduct themselves and to prevent abuse of the court's process. Specifically, the three other recognized purposes of costs awards are to encourage settlement, to deter frivolous actions and defences and to discourage unnecessary steps that unduly prolong the litigation: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, 2006 CanLII 35819, 82 O.R. (3d) 757 (C.A.), at para. 26.

[7] In the civil law context, the relevant factors in that exercise of discretion to fix costs is outlined in Rule 57.01(1) as follows:

> "**57.01(1)** Factors in discretion – In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
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> (0.a) 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;
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> (0.b) 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;
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> (a) the amount claimed and the amount recovered in the proceeding;
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> (b) the apportionment of liability;
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> (c) the complexity of the proceeding;
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> (d) the importance of the issues;
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> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
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> (f) whether any step in the proceeding was,
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> (i) improper, vexatious or unnecessary, or

> (ii) taken through negligence, mistake or excessive caution;
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> (g) a party's denial of or refusal to admit anything that should have been admitted;
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> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
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> (i) commenced separated proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
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> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
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> (i) any other matter relevant to the question of costs."

[8] Absent special circumstances, costs follow the event. "It is worth repeating that a costs award does not have to be measured with exactitude; rather, it should reflect a fair and reasonable amount that should be paid by the unsuccessful parties.": *Butler v. Royal Victoria Hospital*, 2018 ONCA 409, at para. 18.

[9] In exercising discretion, the "overriding principle" in fixing costs is to fix an amount that is "fair and reasonable": *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 24; see also, *Zesta Engineering Ltd. v. David Cloutier*, 2022 CanLII 25577 (Ont. C.A.), at para. 4; *Coldmatic Refrigeration of Canada Ltd. v Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.), at para. 8.

[10] As recently outlined in *Apotex Inc. v. Eli Lilly Canada Inc*., 2022 ONCA 587;

> **"59** The relevant principles to be applied in a court's exercise of its discretion to award costs under s. 131 of the *Courts of Justice Act*, *R.S.O. 1990, c. C.43* are well established. They include the myriad factors enumerated in rule 57.01(1) of the *Rules of Civil Procedure*, such as: the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, as well as "any other matter relevant to the question of costs". This is not a mechanical exercise or a rubber stamp.
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> **60** A proper costs assessment requires a court to undertake a critical examination of the relevant factors as applied to the costs claimed and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable": *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, 466 D.L.R. (4th) 2, at para. 356, citing *Boucher v. Public Accountants Council (Ontario*) (2004), 71 O.R. (3d) 291 (C.A.), at para. 24. However, as this court recently reiterated in *Restoule*, at para. 357, referencing *Murano v. Bank of Montreal (1998),* 163 D.L.R. (4th) 21 (Ont. C.A.), at para. 100, "this overall sense of what is reasonable

> 'cannot be a properly informed one before the parts are critically examined'".
>
> **61** The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant: *Boucher*, at para. 26.
>
> **62** While the reasonable expectation of the parties concerning the amount of a costs award is a relevant factor that informs the determination of what is fair and reasonable, it is not the only, determinative factor and cannot be allowed to overwhelm the analysis of what is objectively reasonable in the circumstances of the case. To hold otherwise would result in the means of the parties artificially inflating costs with the concomitant chilling effect on access to justice for less wealthy parties. As this court cautioned in *Boucher*, at para. 37: The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties."

[11] Fixing the appropriate costs award requires a two-part analysis. Firstly, I must undertake a critical analysis of the relevant factors in exercising my discretion including relative success or failure from the motions, Rule 57.01(1), and any other matter relevant to the question of costs claimed. Secondly, and only then, am I to "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable." And in this two-part analysis, the failure to consider and undertake a critical analysis of the relevant factors before "stepping back" is an error.

[12] Counsel for the plaintiff submits that the extreme remedy being sought in TBL's motion to stay the plaintiff's action was of critical importance yet was unsupported by sufficient evidence to seek the relief sought. Upon hearing that motion, as indicated in my decision dated December 15, 2025, I agreed that there had been no abuse of process justifying such a stay that was sought. I did however agree in the circumstances presented to grant the alternative orders requested by TBL in their motion as well as their request to defer the plaintiff's motion to dismiss against Clifford Lowery until his examination for discovery is complete.

[13] Counsel for the plaintiff further submits that, in the exercise of my discretion to award costs, the main factors here are as follows;

a. The principle of indemnity, including the experience of the lawyer as well as rates charged, and hours spent by that lawyer;

b. The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding;

c. The importance of the issues;

d. The conduct of a party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

[14] Counsel for the TBL essentially submits that there is a quantum differential calculation for substantial indemnity versus partial indemnity costs, and that not being successful at having the action stayed is not grounds for substantial indemnity costs. Furthermore, it is submitted there is nothing in the conduct of TBL that would warrant that scale of costs.

[15] It is pointed out that the attached Docketing Report (Schedule "A") does not contain any date entries however contains an entry identified as "began preparation of appeal materials" for which no amount of costs can be claimed. TBL also takes issue with the total hours claimed by both plaintiff Counsel as well as the breakdown of total hours claimed, submitting that the plaintiff's motion to terminate the litigation in connection with Mr. Lowery should result in there being no costs awarded for that motion since the plaintiff obtained only a "mixed result".

[16] While recognizing the importance of the issue of a potential abuse of process, TBL submits that the reasonable expectations of the parties with respect to the costs of these dismissal motions were reasonably informed by my two prior costs awards in 2023 and 2024 in this matter. Also of some importance in my view, as submitted by Counsel for TBL, is the conduct tending to shorten or unnecessarily lengthen the TBL motion had the plaintiff made it clear at the outset of their "distinction between getting instructions and getting input". More than reducing the costs that might otherwise bet awarded here, Counsel for TBL submits that such conduct by the plaintiff merits a denial of any costs. And although I have not been satisfied to deny the plaintiff an award of costs for such conduct, I am satisfied that such conduct by the plaintiff did "lengthen unnecessarily the duration of the proceeding" justifying some reduction in their costs award.

[17] With respect to the TBL argument that "the quantum claimed is grossly excessive", I note that Counsel for TBL has not put their bill of costs before this Court for these motions in support of its submission. As Winkler J. (as he then was) stated in *Risorto v. State Farm Mutual Automobile Insurance Co.* [2003] O.J. No. 990;

> "[10] The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when

> allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter".

[18] In *Apotex Inc. v. Eli Lilly Canada Inc.*, the Court of Appeal for Ontario explained:

> "[71] In assessing what was reasonable, fair, and proportionate for the losing party to pay in the particular circumstances of this case, the motion judge properly considered the relevant factor of the reasonable expectations of the parties. He also noted that Apotex had not revealed costs it had incurred and inferred from this that its legal fees were similar to those incurred by Eli Lilly. While the lack of disclosure of Apotex's costs is not dispositive of the issue of reasonableness, the amount of its own costs is nevertheless a relevant factor that informs the reasonableness of the parties' expectations as to the amount the losing party could reasonably be expected to pay."

[19] The Ontario Court of Appeal in *Bondy-Rafael v. Potrebic*, 2019 ONCA 1026, indicated at paragraph 57:

> "[P]artial indemnity fees are not defined in terms of an exact percentage of full indemnity fees under the *Rules of Civil Procedure*. While representing a portion of full indemnity costs, that portion has never been defined with mathematical precision but generally amounts to a figure in the range of more than 50 percent but less than 100 percent. This is as it should be given the myriad factors that the court must consider in the exercise of its discretion in fixing costs."

[20] The Court of Appeal for Ontario's decision in *Whitfield v. Whitfield*, 2016 ONCA 720 is instructive in this regard as follows:

> "[22] We agree with the respondent's submission. Unless full indemnity costs are warranted, it would be an error in principle to grant an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial or full indemnity basis. The appellant's argument has been previously rejected by this court: see *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.), at para. 36; *Wasserman, Arsenault Ltd. v. Sone*, [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.), at para. 4; *790668 Ontario Inc. v. D'Andrea Management Inc.*, [2015] O.J. No. 4018, 2015 ONCA 557, 336 O.A.C. 383, at paras. 21-23.

> [23] To order otherwise would remove the distinction between partial indemnity and substantial or full indemnity costs and overcompensate the appellant. Partial indemnity costs are simply that: partial and not full compensation for a party's costs. Substantial indemnity provides far greater compensation and full indemnity results in complete reimbursement for costs. As a result, absent applicable settlement offers, substantial and full indemnity costs are reserved for rare and exceptional cases."

[21] Upon my close examination of these specific circumstances and Counsel for the plaintiff's Docketing Report, I do not see these motions to be one of those rare and exceptional cases where substantial indemnity costs are justified. The *Whitfield* decision provides this guidance on the question of quantum and what amount of partial indemnity costs should be awarded:

> "[29] What discount should be applied is within the discretion of the court and not a matter of a precise mathematical calculation. As this court noted in *Wasserman*, at para. 5: The degree of indemnification intended by an award of partial indemnity has never been precisely defined. Indeed, a mechanical application of the same percentage discount in every case where costs are awarded on a partial indemnity scale would not be appropriate. In fixing costs, courts must exercise their discretion, with due consideration of the factors set out in rule 57.01(1), in order to achieve a just result in each case."

[22] I agree that a costs award should follow the overall outcome of a hearing. I have also not been made aware of any offer to settle these motions. I have also considered the principle of indemnity including 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 this step in the proceeding, the complexity of the proceeding, and the importance of the issues as well as the conduct of any party.

[23] Having undertaken my critical analysis of the relevant factors here as applied to the costs claimed, and then stepping back and considering the result produced as well as the application of the principle of proportionality and questioning whether, in all these circumstances, the result is fair and reasonable, I have been satisfied to fix an award of costs for these motions in the all-inclusive amount of $20,000, to be payable by the defendant TBL to the plaintiff within 30 days.

Date: February 26, 2026

The Honourable Justice David Nadeau