

**CITATION:** Joshi v. David Grace, 2023 ONSC 3980  
**COURT FILE NO.:** CV-22-687465  
**DATE:** 20230704

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
SANJIV JOSHI and XPERT LAW INC. ) Daniel Z. Naymark and Dillon Collett, for  
) the Plaintiffs  
Plaintiffs )  
)  
– and – )  
)  
DAVID GRACE, 563973 ONTARIO ) Monica Unger Peters, for the Defendants  
LIMITED and OLYMPIA ATHLETIC )  
CAMPS LIMITED )  
Defendants )  
)  
)  
)  
)  
) **HEARD:** In Writing

2023 ONSC 3980 (CanLII)

**PAPAGEORGIU J.**

**COSTS ENDORSEMENT**

**I. Overview**

[1] On February 27, 2023, I dismissed a motion brought by the plaintiffs, Sanjiv Joshi (“Joshi”) and Xpert Law Inc. (“Xpert”), for an interlocutory order reinstating Joshi as an officer of the Olympia Health Athletic Camps Limited (“Olympia”) and removing David Grace (“Grace”) from his position as a Director of Olympia and the defendant, 563973 Ontario Limited (“Parent Co”) (collectively the “Companies”) and permitting Joshi to solely manage the Companies.

[2] Grace seek costs of this motion in the amount of \$134,975.60 in fees on a substantial indemnity basis, plus disbursements in the amount of \$9,763.41, plus H.S.T., or alternatively in the amount of \$116,980.10 on a partial indemnity basis, plus the same disbursements.

[3] Joshi asserts that no costs should be awarded or that they should be awarded in the cause. His secondary position is that they should be awarded on a partial indemnity basis and reduced from that claimed by Grace on the basis of inappropriate inclusions from a review of the invoices.

## II. Decision

[4] For the following reasons, I am awarding Grace \$103,456 in costs on a substantial indemnity basis, payable within 30 days.

## III. Issues

[5] Although the usual issues when determining costs are relevant, the main issue is whether there is a basis to order substantial indemnity costs.

## IV. Outline

[6] I will review the applicable law and then analyze the applicable criteria in this case.

## V. The Court's discretion with regard to costs

[7] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, sets out the factors which courts should have regard to when awarding costs. 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”: *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (C.A.), at para. 4; *Boucher v. Public Accountants for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Davies v. Clarington (Municipality) et al.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191.

[8] Judges have a duty to fix or assess costs in reasonable amounts and have a duty to make sure that the hours spent are reasonably justified: *Pagnotta v. Brown*, [2002] O.J. No. 3033 (S.C.), at para. 25.

[9] Further, there must be practical and reasonable limits to the amounts awarded for costs and those amounts should bear some reasonable connection to the amount that should reasonably have been contemplated: *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.), at para. 26; *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2003), 170 O.A.C. 388 (S.C.).

[10] The Court has the discretion to award substantial indemnity costs, but such costs are “rare and exceptional” and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: *Duca Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601, at para. 5 and *Foulis v. Robinson*, (1978), 21 O.R. (2d) 769 (C.A.), and most recently *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.

[11] I will address the criteria in r. 57.01(1) first and then the issue of whether substantial indemnity costs should be awarded.

## **VI. Importance of the Motion**

[12] The motion was important to Grace for the following reasons.

[13] Grace is 82 years old and had dedicated his life to teaching adolescents, first as a teacher and for the past 50 years as founder and operator of the Companies. He earns \$100,000 from his position and had invested \$500,000 of his personal savings into the Companies. Joshi's motion sought to oust Grace from his position with the Companies and thus threatened his legacy.

[14] Thus, Grace was justified in expending significant resources to defend; further, in the circumstances, this expenditure was within Joshi's reasonable contemplation.

[15] Grace was successful, even in respect of whether Joshi had satisfied the first aspect of the test which is whether he had demonstrated a *prima facie* case. Grace is presumptively entitled to costs.

## **VII. Complexity**

[16] The motion was complex for the following reasons.

[17] As set out in *BCE Inc v. 1976 Debentureholders, Re*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 72, the oppression remedy involves a consideration of: "general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders." The business reality of how the parties interacted is also important: *BCE*, at paras. 53-59.

[18] The scope of the applicable test involved the analysis of multiple different issues that arose and positions which the parties took with respect to these.

[19] There were over 8,000 pages of materials uploaded to CaseLines which included two sets of cross examination, hundreds of pages affidavits (even without exhibits), closing corporate documents, multiple email chains, documents related to the state of the business and analysis of financial controls, financial documents, various transactions that occurred during the parties' relationship, and other correspondence and documents all related to the issue of whether Joshi had a reasonable expectation to managing the Companies.

[20] It involved one full day of argument on the first date and two full days of argument when the matter returned, although I acknowledge that I awarded \$10,000 to Joshi in respect of the first return date which was adjourned.

[21] Its complexity also justified the expenditure of significant resources by Grace, and as such, it was within Joshi's reasonable contemplation that Grace would expend significant resources.

## **VIII. Conduct alleged by Joshi against Grace**

[22] I reject Joshi's arguments that Grace's conduct justifies a "no costs" or "costs in the cause" order.

[23] To explain, when this motion was originally returnable on January 12, 2023, I adjourned it by reasons dated January 13, 2023 (which was a Friday) to February 9, 2023 to allow Grace to file materials, for Joshi to file responding materials and for the parties to conduct cross examinations. In the interim, I awarded \$10,000 in costs thrown away and imposed terms which included partial restoration of Joshi's role as "Camp Director", advising staff of this, and providing Joshi with access to the records of the Companies.

[24] Joshi alleges that Grace failed to advise staff of the restoration of Joshi's role "immediately" because Grace did not deliver a written draft notice which Joshi had prepared and asked to be sent. I never directed that this notice or any written notice should be delivered.

[25] Grace's evidence was that he advised staff of the partial reinstatement of Joshi at a meeting over zoom which apparently took place on January 17, 2023 or January 18, 2023 which was the Tuesday or Wednesday following the decision I released on the previous Friday. In fact, staff must have been advised before-hand because during the zoom call, which was recorded and which I viewed, staff asked whether Joshi had been sent the zoom link. Had they not already known about the Order, this question would not have been asked since Joshi had not been involved in the business since September 2022. At the meeting Grace said that he did not believe Joshi was sent the link and questioned whether Joshi's email had been activated yet. They discussed the fact that since this was an ordinary weekly meeting which they held, it should proceed. I add that Grace's evidence was that he only heard about the ordered terms on January 17, 2023 and I have no basis to question that.

[26] Given the timing of the scheduled meeting, which was shortly after my decision released to the parties on Friday January 13, 2023, I do not find it concerning that this meeting occurred without Joshi present. It was recorded and ultimately sent to him. It is true that someone else who Joshi objects to, Butch Carter, was running the meeting, but I find this reasonable given the recency of my Order, the Companies' difficult financial circumstances which required some continuity, the fact that Joshi was not there and that Mr. Carter had assumed this role months before my Order. Further, I never ordered that Mr. Carter should be removed.

[27] I find it interesting that Joshi raises significant complaints about what he asserts is a lack of financial controls at the Companies and then complains that Mr. Carter was at the meeting addressing these very issues.

[28] With respect to Joshi's allegation that Grace had failed to provide him access to the records, the wording of the terms with respect to his access were as follows: "Joshi may have access to all records of the Corporations." There was no specific timing set out in the terms. The matter was ongoing, the parties were preparing materials for the further hearing, which was less than a month away, in the course of which they each prepared and filed two additional comprehensive affidavits, conducted cross examinations and answered undertakings.

[29] When counsel raised Grace's failure to provide adequate access at the return of the motion, I reviewed correspondence from the various personnel working on access and was satisfied that they were doing their best to provide the information which I directed Joshi "may" have access to. I said so right in my February 27, 2023 reasons. They were answering his requests in a reasonable manner given the timing of my Order, the nature of the requests, as well as the nature of the business which is a small business with a limited number of staff. Joshi's expectations of this staff were entirely unreasonable in the circumstances and I found he behaved in an aggressive manner with staff which upset them and potentially jeopardized the business. There are multiple examples of emails from staff about this.

[30] For example, by email dated January 17, 2023, Joshi made significant requests for documentation from staff which he demanded be returned to him by January 19, 2023, two days later. By email dated January 18, 2023, the staff he emailed advised that she had not been working the previous day and then by email dated January 20, 2023 she wrote:

I am acknowledging receipt of your email and I am working on the response. Given the scope of your requests, it will take me to the end day, January 25, 2023, for responses for review and comments. For the requests to provide a copy of all receipts, support and reports, it will hopefully be by the end of Feb. 1, 2023.

With regards to the at least 4 hours of meeting weekly, I am at capacity with my current workload, in addition with the added workload of responding to your requests. I am not comfortable with the extra demands you are placing on me and I will need additional support to cover my current workload before adding at least 4 hours of weekly meeting.

[31] As set out in my decision, Joshi appears to not understand the finer points of this business. While he expresses significant concerns about its operations, the way in which he has approached this disclosure and treated staff caused them significant stress and discomfort which interfered with the performance of their jobs. Catering to his aggressive demands within the timeframe he expected was undermining the actual operations of the business about which he expresses so much concern.

[32] Finally, he alleges that Grace failed to keep a logbook of his actions as he himself did. I note that the wording of the terms I ordered with respect to this issue were different for Grace and Joshi. Joshi was ordered to keep track of "all instructions he gives to staff and all actions he takes with respect to the [Companies]". Grace was required to keep a log of "any material actions he takes with respect to the [Companies]". Joshi did provide a log and Grace did not. This does not mean that Grace did not comply as there is no evidence that anything Grace did during this interim period was out of the ordinary course or that there was anything "material" to advise the court of which Grace did during this period.

[33] It is true that Grace did not pay the costs order in the amount of \$10,000 after the first hearing. That breach does not rise to the level of eliminating costs in this case. Grace earned a

modest income, the businesses at issue were unprofitable, he injected an additional \$500,000 over the past few years to help these businesses survive and he was unable to access any of the Companies' funds to pay for this proceeding; he had to fund it on his own. Nevertheless, I will be taking this into account in my overall assessment by reducing the costs awarded by \$10,000.

[34] I add that the case of *Feinstat v. Feinstat*, 2012 ONSC 5339, 27 R.F.L. (7th) 317, cited by Joshi, was a family law proceeding where there were findings made against Mr. Feinstat of consistent and deliberate violation of court orders. These are not the facts here at all and there is no basis for any such finding as against Grace.

[35] This was an interim order in the context of fast paced litigation which was ongoing. Grace and the Companies did the best they could, and as quickly as they could. There was no proven deliberate or consistent breach of court orders by virtue of any of these issues which he asserts.

[36] The kind of arguments which Joshi makes in respect of costs is the same kind of over-reach that I found with respect to his motion in the first place.

**XI. Should costs be ordered in the cause because this matter was an injunction motion?**

[37] I reject Joshi's argument that I should order costs in the cause because this was an interim motion.

[38] Joshi references the following caselaw which I do not find applicable here.

[39] In the case *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, (2008), 76 C.L.R. (3d) 125, cited by Joshi, the court makes this statement at para 10:

10. In the Tilsonburg case, Mr. Justice Matheson cited at length the following passage from page 2-91 of Justice Robert Sharpe's text, *Injunctions and Specific Performance*:

Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith...On the other hand, it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the question of costs to the trial judge.

[40] This case does not provide the support which Joshi alleges, as he was the party who brought the injunction motion which failed.

[41] The case *Satschko v. Ontario (Government Services)*, 2008 CanLII 3229 (Ont. S.C.) does suggest that it may be appropriate in some cases to order costs in the cause in respect of an interim

injunction motion.. However, in that case the court also references cases where costs were awarded against plaintiffs who brought unsuccessful injunction motions. The court cites *Apotex v. Egis Pharmaceutical* (1990), 2 O.R. (3d) 126 ( Gen. Div.), which resulted in an award of costs to be paid forthwith to the responding party who successfully defeated the motion.

[42] In the exercise of my discretion, I am satisfied that a no costs order, or even an order for costs in the cause would work a considerable injustice towards Grace.

### **X. Substantial indemnity costs**

[43] I am satisfied that it is appropriate to award substantial indemnity costs in the all the circumstances.

[44] As noted above, substantial indemnity costs are “rare and exceptional” and only warranted where there has been reprehensible, scandalous or outrageous conduct on the part of a party: *Duca Financial Services Credit Union Ltd.*, at para. 5 and *Foulis* and most recently, *Mars Canada*, at para. 43.

[45] In *Mars Canada*, also an oppression remedy case, the Court of Appeal confirmed, at para. 43, that “the kind of conduct that will justify an elevated level of costs is not limited to conduct in the proceedings and can include the circumstances that gave rise to the litigation.”

#### Circumstances that gave rise to the litigation

[46] I have concluded that there is a basis for substantial indemnity costs because of the circumstances that gave rise to the litigation.

[47] First, in my reasons, I found that with respect to the bringing of the motion, Joshi did not come to court with clean hands.

[48] I wrote:

145. As well, in my view, Joshi does not come to court with clean hands for the following reasons: i) his communications with Ms. Salih, as set out above; ii) his failure to include the loan receivable in the amount of \$1,460,000 in Olympia’s assets during his conversation with Grace and Mary in January 2022; iii) communications he had with TD Bank in May 2022 where he misrepresented himself as being a Director of Olympia and wherein he sought to make himself the sole signing authority without copying Grace on the emails; iv) his entering into a construction contract with his brother-in-law’s company OSMI for \$1,356,000 when he knew that Olympia’s finances could not bear it, without seeking any competing bids, and without seeking Grace’s authorization; v) his prior negotiation of a loan from Olympia to his company Xpert Credit in the amount of \$1,000,000 which was not repayable for one year after the mortgage which he arranged came due.

[49] Joshi's counsel has requested that I publicly address an error in my decision in paragraph 74 and 75 wherein I stated that the final email from TD Bank regarding his request for sole signing authority was not copied to Grace. In fact, it was my error and I acknowledge that was the case, although the important point is that the correspondence still demonstrates that Joshi was seeking to obtain sole signing authority shortly after purchasing his shares in Parent Co., that he wrote to TD signing his email as a Director which he was not at the time, and that none of his emails to TD Bank regarding this matter were copied to Grace or to Olympia's corporate counsel. However, I note that they were copied to his wife, a lawyer, who had previously represented the Companies and so there was some thought put into who was receiving his email correspondence apart from TD Bank. There is no explanation for why he would seek sole signing authority in this manner without copying Grace.

[50] And in any event, his evidence on this point is still questionable as he stated in his affidavit that he spoke to Grace about "adding himself as a signing authority for Olympia's bank account" when what he wrote in the appended emails to TD Bank was that he was seeking sole signing authority.

[51] Second, while Joshi has alleged that Grace misappropriated \$750,000 (which could not be proven) it was Joshi who obtained \$250,000 from the Companies, ostensibly to pay expenses. He sought to later explain this by asserting that this was because the Companies' cashflow was insecure. This made no sense since the money came from the Companies—therefore, cheques could still have been drawn on the Companies' accounts if the money remained in those accounts. What it did do, however, was ensure that there would be no oversight from Grace as to what Joshi spent. He did not provide an invoice until after these issues arose and even then, the proven uses of these funds has been questionable.

[52] I add that there was no basis for any reasonable belief that Joshi could possibly establish irreparable harm in the circumstances or that the balance of convenience favoured him:

- Grace had founded these Companies.
- Xpert had only been a shareholder for a matter of months before the dispute arose.
- Joshi had not negotiated any right to be a Director of Olympia in the closing documents or any changes to Olympia's constating documents which he could have done (only that he would be appointed a Secretary and Treasurer. This appointment could be undone by Grace at any time because Joshi did not negotiate for himself the right to have become a Director of Olympia whose constating documents only provided for one Director, who was Grace at the time). Even if there were some discussions about this afterwards, it was always subject to Grace's consent as the only Director of Olympia.
- he did not negotiate any particular job description or use the words "co-manager" in his correspondence with Grace before their dispute, although he certainly did

after the dispute arose—he could have sought to obtain this sort of agreement before Xpert bought the shares.

- he had only purchased his shares in Parent Co. for \$420,000 and had been offered \$600,000 by Grace shortly after the dispute arose which would have made him more than whole.
- the record demonstrates that he believed that the investment was risky and that the business was not worth much.
- he stated that he had made his investment as a favour to Grace.
- His role in the Companies was not even shown to be his main work. He is a mortgage broker who also runs an investment fund which provides financing. He stated that people who do not wish to keep money in traditional investments advance money to his company which he then lends out as either a first, or second mortgage. He talked about his friendship with Grace, said that he loved him and was trying to help him. If that was the case, it is interesting that he did not simply loan Grace the money from his own investment company, rather than arranging new mortgage financing which cost approximately \$1,000,000 in fees and bonuses.
- As well, there was evidence that Parent Co. owns real estate; a draft valuation Joshi provided indicated this property was worth \$8,000,000. Notwithstanding his negotiating position with Grace and his wife, where I found he presented calculations that showed that the business had no value, the evidence showed that there was significant value because of the value of this land, even taking into account the Companies' debts.

[53] Nevertheless, Grace was put to tremendous expense to provide a fulsome response and analysis because of the complexity and importance of this matter.

[54] And the ultimate motion which Joshi brought to oust Grace from his position as Director of Olympia would mean that either Olympia would have no Director, or that the court would have to appoint Joshi as a Director, a right that he did not negotiate for himself or have. This court would have had to rewrite their agreement.

[55] I wrote:

149....For reasons which are not yet apparent, [Joshi] prefers instead to spend what I expect (based on the extensive record before me) are already tens of thousands if not hundreds of thousands of dollars on legal expenses to litigate so that he can become the sole Director of the Companies. The ultimate relief he seeks in his Statement of Claim, which was issued on September 19, 2022, is a court order that he be permitted to buy Grace out.

150. The Moving Party's overall position in this lawsuit is perplexing. Joshi says he invested in these Companies as a favour to Grace because he "loves" him, and still does. He has had the opportunity to recoup his investment plus an almost 50 % return, but instead wishes to oust Grace so that he can make all decisions about Olympia and Parent Co. on his own, without Grace's oversight. Joshi is a mortgage broker who has other full time businesses which are ongoing. He has not provided any evidence that he has some particular passion about children or children's camps which might explain his position and his actions. Mary Butcher's email of February 2, 2023 advises that the financial future of Olympia looks bleak.

151. None of this adds up.

152. I am inferring that there must be some other significant value within the Companies and their assets (perhaps the Limberlost Property or some corporate opportunity in respect of this property) which, thus far, has not emerged. I did raise this with Joshi's counsel during the motion and he became quite offended but there is no other reasonable explanation for Joshi's actions, as a businessman making rational business decisions. It is interesting that Joshi's January 12, 2022 handwritten notes wherein he valued Olympia did not even do so on the basis of its value as a going concern; he valued it based on a windup. As noted above, Joshi is a mortgage broker and lender who provides construction financing as part of his work.

153. Furthermore, even if the Limberlost Property is only worth approximately \$8,000,000, as the **draft** appraisal provides, it could be sold to satisfy any judgment. Joshi's calculations in his January 2022 notes indicate that Olympia's total debts were approximately \$5.5 million. Accordingly, there appears to be equity of over \$2.5 million available to satisfy any judgment despite the fact that there is now a lien by OSMI for \$1,365,000 since the loan receivable from Xpert in the amount of \$1,460,000 offsets this completely. It is also interesting that the lien in favour of OSMI is almost the same amount as Olympia's loan receivable from Expert Credit.

[56] I understand from Joshi's costs submissions that he has not sought to appeal my decision; if he thought that my conclusions regarding the circumstances which gave rise to the litigation were unfounded, he should have sought to do so rather than seek to reargue some of my conclusions in his costs submissions.

#### The conduct of the litigation

[57] I have also concluded that there is a basis for an award of substantial indemnity costs because of the way in which Joshi conducted the litigation.

[58] First, with respect to the bringing of the motion, I found that Joshi had taken pictures of the Camp property in a manner which was contrived to make the Camps like they were in a state of disarray without his help. He took multiple pictures of the same rooms from different angles. These rooms were mostly storage or something similar.

[59] Second, Joshi made scandalous allegations against Grace which could not be proven. He alleged that Grace had used a new bank account to misappropriate \$750,000 which was diverted from his old bank account to this one. In my reasons, I concluded that this misappropriation could not be established on the record before me. Indeed, Grace had voluntarily disclosed this bank account in the very first affidavit he filed, where he said he set up this bank account because of his fears about Joshi. I concluded that it was inconceivable that the Companies could have paid their ongoing expenses if he had used this new account to misappropriate these funds. One of the staff wrote in an email:

The emails from Sam and Mary are progressively getting more aggressive...There are the wordings to imply that I am involved or aware of a secret bank account...I take offence to this...They keep asking the same thing over and over...The sheet for 15 attached from today, Mary was quite aggressive on attacking me....I don't think I should have to put up with this. It is not right. This is just too much.

[60] Third, as set out above, Joshi's conduct with staff after I imposed terms in January 2023 was aggressive and unreasonable and jeopardized the Companies' ongoing operations. He behaved in a bullying manner which was inconsistent with the concern he was expressing about the Companies.

[61] Finally, Joshi has repeated several of the arguments in his costs submissions which I did not accept at the hearing of the motion.

#### Conclusion re substantial indemnity costs

[62] Joshi's conduct relating to what gave rise to the litigation, as well as the way in which Joshi conducted the litigation is the kind of conduct that justifies substantial indemnity costs, as per *Mars Canada*.

[63] In making this finding, even though this was only an interim motion and there are no final findings as yet, I point out that I have reviewed a record comprising approximately 8,000 pages. In doing so, I believe I have reviewed almost all contemporaneous documents relevant to the issues which Joshi has raised as to whether or not he was oppressed based upon his removal. Most of the findings I made as to his failing to come to court with clean hands were based upon documents which he himself submitted and relied upon. This includes: i) the emails to TD Bank seeking to obtain sole signing authority which he wrote; ii) his own notes regarding the negotiations he had with Grace where he misrepresented the value of the Companies' assets; iii) construction contract which he caused the Companies to enter into with his brother in law for \$1,356,000, which he signed on his own approximately one month after purchasing shares, without seeking competing

bids, in circumstances where he knew that the Companies' finances could not bear it, and before he was even appointed a Secretary Treasurer. There is no explanation as to why Grace was not asked to sign this construction contract.

### **IX. Hours and rates**

[64] Joshi's counsel argues that the hours spent are grossly disproportionate to the issues in the proceeding. I will start with his calculation of the appropriate quantum of partial indemnity costs and substantial indemnity costs which he asserts are fair and reasonable which are \$24,388.95 and \$53,125.16, respectively, inclusive of disbursements.

[65] There are amendment motions which attract partial indemnity costs of more than \$24,388.95; the fact that Joshi makes this argument about a motion which was as important and complex as this one, which involved 8,000 pages of materials, involved argument over two days, and which he lost on every single issue, is, once again, the kind of over-reach which Joshi has continually displayed.

[66] There were two law firms who acted for Grace. He terminated his first law firm's retainer in or around December 2022.

[67] I mostly disagree with Joshi's arguments about rates and hours, but he has made some valuable points which I am taking into account with respect to the first law firm's time. I will explain how I am reducing the costs award related to the first law firm.

#### The first law firm's time

[68] The first law firm spent 147.3 hours on the matter. The total substantial indemnity costs claimed in respect of their services is approximately \$56,328 and the partial indemnity quantum is \$48,784.

[69] I agree that there are some things included in Grace's Bill of Costs which relate to his former counsel which should not be included or which should be reduced.

[70] For example, some of his former counsel's time does appear to relate to the action itself, as opposed to the motion which Joshi brought. However, the tight timing of both Joshi's commencement of the action and then the motion, meant that those lines were somewhat blurred.

[71] Joshi also argues that former counsel's invoices show that they were addressing other litigation brought by Grace against Joshi. I agree that counsel did do this, but these matters were also related to Joshi's action and Graces' allegations against Joshi; investigations with respect to these matters were also relevant to this motion.

[72] He argues that the only reasonable amount of time which Grace's former counsel spent which can be attributed to this motion is \$9,639 which related to Joshi's first cross examination, subject to his argument that pursuant to r. 39.02(4)(b) which I discuss below.

[73] Joshi also argues that there should be some adjustment because of the change in lawyers which resulted in redundant costs as new counsel had to come up to speed. I agree that some adjustment is required because of this.

[74] Joshi has not raised any issues as to the rates charged by Grace’s first law firm and I find them reasonable.

[75] In the exercise of my discretion, I will reduce the first counsel’s time by 3/4 to address the issues raised by Joshi, which I have accepted as relevant.

Rule 39.02(4)(b)

[76] Rule 39.02(4)(b) provides that a party who cross examines on an affidavit, regardless of the outcome, is liable for the partial indemnity costs of every adverse party on the motion regardless of the motion “unless the court orders otherwise.”

[77] In the exercise of my discretion, I am ordering otherwise. The purpose of r. 39.02(4)(b) is to cut down on the number of cross examinations unless there is a valid and reasonable reason for them. It is appropriate to award costs for cross examinations where it was necessary and played a part in the overall outcome of this matter, which I so find. I am awarding Grace the costs of these, departing from r. 39.02(4)(b), and not awarding the costs of Joshi’s cross examination to him.

Grace’s second law firm

[78] I disagree that any amounts should be reduced from the second law firm’s account. I will explain.

[79] Joshi raises issues about the rates charged by Graces’ current counsel which are as follows:

Name	Years of Experience	Partial Indemnity	Substantial Indemnity	Full Indemnity
Monica Peters	12	\$260	\$300	\$400
Lana Borenstein	2	\$121	\$139	\$185

[80] He makes the following argument as to why these rates are overstated:

The Rules specify that substantial indemnity is 1.5 times partial indemnity (so by equivalence, partial is 2/3 of substantial). The lawyers’ partial indemnity rates in this outline have been set higher, at 86-88% of substantial indemnity, apparently based on 65% of full rates. This overstatement can be adjusted by applying a downward factor of 23%.

[81] He cites no caselaw for this argument and I disagree that the appropriate substantial indemnity rate can be reverse engineered in this manner. The above rates are reasonable and fair and within Joshi’s reasonable contemplation.

[82] I point out that the costs outline submitted by Joshi shows the following rates, which rates are comparable to Grace’s partial indemnity and full indemnity rates. Importantly, he has failed to set out his substantial indemnity rate at all.

Name	Years of Experience	Partial Indemnity	Substantial Indemnity	Full Indemnity
Daniel Naymark	14	\$274	None stated	\$550
a Dave Collett	5	\$175	None stated	\$340

[83] Joshi argues that his counsel spent 100 hours less than Grace’s, presumably in furtherance of the argument that the costs claim is not within his reasonable contemplation. He also argues that he drafted more of the materials before the court and so Grace’s counsel’s time is also overstated because of this as it is not comparable.

[84] I reject these arguments. The nature of this matter was extremely complex. Grace’s lawyers spent a total of 444 hours which is composed of 147 hours from the first set of lawyers and 297 from his second lawyers. I have already reduced the first lawyer’s account by  $\frac{3}{4}$  which is by approximately 110 hours, leaving the total number of hours I am awarding costs in respect of to be 333 hours. This is comparable to the total number of hours spent by Joshi’s counsel which is approximately 345 hours based upon their Bill of Costs. Therefore, I have already taken into account the disparity in hours when I reduced the first lawyer’s account.

[85] I am awarding these in full on a substantial indemnity basis.

Disbursements

[86] Joshi claims that most of the first law firms disbursements pre-dated the motion in terms of searches and photocopies in the approximate amount of \$1,000. I will be deducting these.

[87] He also claims that he need not pay the cost of the transcripts of the cross examination. As I have set out, I am exercising my discretion to award Grace the costs of the cross examinations which included transcripts in the amount of \$7,676.90. I will be awarding these.

**X. Conclusion**

[88] In the end, I am awarding Grace substantial indemnity costs based upon  $\frac{3}{4}$  of his former counsel's time which has been reduced to reflect Joshi's arguments as well as redundancies of having the first law firm involved. I am awarding Grace 100 % of his current counsel's time on a substantial indemnity basis, together with disbursements in the amount of \$7,676.

[89] These costs shall be reduced by the \$10,000 which Grace was ordered to pay and shall be paid within 30 days.

[90] The following is a breakdown of the amounts awarded

Former counsel: $\frac{3}{4}$ of substantial claimed	\$14,082
Current counsel: full substantial indemnity	\$78,646
Disbursements: reduced as per above	\$7,676
Total	\$100,404
HST	\$13,052
Total	\$113,456
Deduct \$10,000	\$10,000
Total payable	\$103,456

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Papageorgiou J.

**Released:** July 4, 2023

