



## Decision

[4] For the reasons that follow I am awarding the individual defendants \$60,000 and Cybermedia \$30,000.

## Issues

Issue 1: Should the defendants be awarded full indemnity costs?

Issue 2: If not, what is the appropriate costs award?

## Analysis

### Issue 1: Should the defendants be awarded full indemnity costs?

[5] Section 137.1(7) directs that if a judge dismisses a proceeding pursuant to this section, the moving party is entitled to costs on a full indemnity basis unless the judge concludes that this scale of costs is not appropriate in the circumstances.

[6] Nordheimer J explained the underlying reason for the presumptive award of full indemnity costs in *Levant v. DeMelle*, 2022 ONCA 79 at paras 78-82.

[7] In short, the underlying reason is:

- (i) to reduce the adverse impact on constitutional values of unmeritorious litigation; and
- (ii) to deter people from commencing proceedings that limit expression on matters of public interest: para 79.

[8] He further explained that notwithstanding s. 137.1(7), costs in such matters is still a matter of discretion.

[9] In this case, the plaintiff argues that it is not appropriate to award full indemnity costs for the following reasons:

- I found that this proceeding bears some, but not all the hallmarks of anti-SLAPP litigation in that the plaintiff has no history of using litigation or the threat of litigation to silence critics;
- The plaintiff is not a large and powerful entity suing smaller opponents, although I did find that there was a power imbalance between the plaintiff and the individual defendants because the plaintiff is a well-known public figure in the Chinese community;

- I found that the plaintiff does not have more power than Cybermedia which has two prominent media sites;
- During the time in question, the plaintiff served on the Executive Committee as a volunteer in the subject non-profit organization;
- The plaintiff did satisfy some aspects of the test including that his case had “substantial merit” in that a reasonable reader would understand the statements in the defamatory sense alleged and that this could and would tend to lower the plaintiff’s reputation in the minds of right thinking persons;
- While I found that the plaintiff was responsible for some delays, he was not responsible for all delays;
- Although the plaintiff concedes that Cybermedia had absolute privilege to make defamatory statements during the litigation, Cybermedia made new and gratuitous defamatory statements in its factum that the plaintiff was “unethical and corrupt.” This resulted in additional arguments and lengthened the proceeding.

[10] In terms of the quantum claimed, the plaintiff has pointed out duplication and errors in the defendants’ Bills of Costs and sets out other arguments as follows:

**Individual defendants**

- \$2,800 is claimed for cross examinations on June 27, 2022 when none were held.
- \$1,000 was already awarded and paid for the September 24, 2022 case conference—therefore the \$595.00 claimed should be deducted.
- \$1,140 is claimed for preparation and attendance at the June 29, 2023 hearing which was adjourned by the judge because he did not have the defendants’ materials in advance. The court had created two caselines files and the defendants only uploaded to one of them while the plaintiff uploaded to both out of an abundance of caution. Had the defendants simply uploaded to both caselines files or made an inquiry regarding this, the motion would have proceeded.
- the defendants’ counsel spent 16 hours on research and hyperlinking their materials which could have been done by a junior or a law clerk.
- the defendants’ counsel spent \$11,385 on preparation for cross examination which is excessive given that the legislation only permits 7 hours of cross examination.

**Cybermedia**

- Senior counsel did all of the work for this motion; some could have been done by a law clerk or a junior.
- \$2,590 is claimed for preparation and attendance at the June 29, 2023 hearing date which was adjourned for reasons which were not the plaintiff's fault. See above.

**Additional concerns**

- Although they indicate that they worked independently, counsel for the individual defendants and Cybermedia work at the same firm. The plaintiff has pointed out some overlap in their dockets.
- the plaintiff's own full indemnity costs for responding to both sets of materials is \$104,035.28 compared to the combined costs claimed by the defendants of \$148,406.61.

[11] The plaintiff also references the case *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129 (CanLii) at para 39 where the Court indicated that Anti-SLAPP motions are screening motions and that as such costs of such motions should generally not exceed \$50,000, although there will be exceptions.

[12] This is in part premised on the fact that these motions are typically to be brought quickly and when they are, they are supposed to be heard within 60 days. The defendants did not seek to bring this motion quickly enough and in my view, this is one of the reasons why the materials ballooned all out of proportion and also one of the reasons why this proceeding had a "tortured" procedural history.

[13] Taking into account the above, in my view a full indemnity costs award is not appropriate in all the circumstances.

**Issue 2: What is the appropriate costs award?**

[14] In the exercise of my discretion, taking into account the issues raised by the plaintiff and fixing an amount that is fair and reasonable for the defendants to pay, I award the following:

- a) \$60,000 to the individual defendants on a partial indemnity basis; and
- b) \$30,000 to Cybermedia on a partial indemnity basis.

[15] These costs are within the reasonable contemplation of the plaintiff and payable within 60 days.

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Papageorgiou J.

