

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

CANADIAN WESTERN BANK

Applicant

and

2722959 ONTARIO LTD. and 2156775 ONTARIO LIMITED

Respondents

**REPLY TO THE COST SUBMISSIONS
SUBMITTED BY THE REGIONAL MUNICIPALITY OF PEEL**

September 19, 2023

KLUG LAW

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TO: Service List

COSTS SHOULD NOT BE AWARDED AGAINST FRANK D'ANGELO PERSONALLY

1. 2156775 Ontario Limited ("215") commenced the first action against Peel in August 2020 arising out of an agreement 215 entered into with Peel for the supply and discharge of water. Peel significantly overbilled 215 for water supplied and for excessive readings resulting in excessive surcharges and discontinuances of the supply of water. 215 commenced a second action against Peel to set aside Minutes of Settlement and a Release. D'Angelo was not a contracting party with Peel. D'Angelo was not a true litigant. 215 was not put forward as a man of straw. The claim against Peel was not an abuse of process. D'Angelo did not put up 215 as a party plaintiff to shield himself from costs. D'Angelo could not commence proceedings in his personal name nor could he be sued in those proceedings.

LEGAL ANALYSIS

2. In *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.*, 1972 CanLII 531 (ON CA), the Court of Appeal stated, referring to the principal of the Plaintiff company:

I can find no basis for the finding that Mr. Kelner was the "actual contracting party". He was undoubtedly the individual who would ultimately benefit, in whole or in part, from the contract, but the contract was made with the company alone. Mr. Kelner could not have sued upon it, nor could he himself have been sued. Both he and Mr. Parsham were pursuing the same course of action; they were quite content to enter into contracts made by the companies which they respectively controlled.

3. In *Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.*, 1997 CanLII 999 (ON CA), the Court of Appeal set forth a three-part test:

Accordingly, in order to bring the appellants within the exception of *Sturmer* as applied in *Rockwell*, it was incumbent upon the respondent to show (1) that the appellants had status to bring the action against Rogers Cable themselves; (2) that TVR was not the true plaintiff and (3) that TVR was a "man of straw" put forward to protect the appellants and presumably

Burry from liability for costs.

4. In *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184 (CanLII), the

Court of Appeal stated:

[59] Any assessment of whether it is appropriate to order non-party costs must begin by considering the court's statutory [page 657] jurisdiction under s. 131(1) of the CJA. This provision limits the court's discretion to order costs against the named parties unless the "person of straw" test is satisfied.

[60] The "person of straw" test is satisfied if
 (1) the non-party has status to bring the action;
 (2) the named party is not the true litigant; and
 (3) the named party is a person of straw put forward to protect the true litigant from liability for costs.

[61] The proper inquiry under the test is whether the intention, purpose or motive of the non-party in putting the named party forward was to avoid liability for costs. The named party must have been "injected into the situation for the purpose of providing a costs screen" or "for the purpose of insulating a non-party from potential cost liability".

[64] The inquiry under the "person of straw" test is not an evaluative one – it does not ask whether the non-party engaged in misconduct serious enough to amount to abuse of the court's processes. Rather, 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 cost 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.

5. The court also has hearing jurisdiction to control its own process to deter an abuse of process by ordering non-party costs.

[77] Costs against non-parties who are directors, shareholders or principals of corporations may be ordered in exceptional circumstances if the non-party commits an abuse of process. Such circumstances may include fraud or gross misconduct in the instigation or conduct of the litigation. But the injunction and authorities referred to in para. 63 of these reasons must be

followed – costs should not be awarded against corporate officers, directors or shareholders simply because they directed the operations of the company.

6. In *Cornerstone Properties Inc. v. Southside Construction Management*, 2020 ONCA 380 (CanLII), the Court of Appeal stated:

[17] In his supplementary submissions, counsel for the appellant gets to the real point of his submissions. He argues, that if a party has no funds to satisfy a costs order, and that party is a corporation controlled in the litigation by another corporation that does have funds, fairness and the purposes underlying costs orders dictate that the successful party should receive its costs from the directing corporate entity that has assets. This argument was rejected in *Laval Too: Laval Tool*, paras. 63, 77, and runs directly against s. 15 of the *Business Corporations Act*, R.S.O. 1990, c. B.16. Counsel's submissions, if accepted, would fundamentally change the accepted notions of corporate identity insofar as costs awards are concerned. It is an argument best addressed to the legislature.

7. It is submitted that the true litigant is 215. Peel submits that D'Angelo should have sought to intervene personally under Rule 13. D'Angelo would never be given status to intervene nor should he be compelled to attempt to intervene.

QUANTUM OF COSTS

8. The costs claimed by Peel are excessive. In particular, 39.6 hours in preparing the *Factum* which totals \$7,794.00 in partial indemnity costs are excessive. It should be no more than \$2,500.00. So too is 8.3 hours on legal research. It is submitted that the amount for Peel, which is fair and reasonable, should be \$20,000.00 all inclusive on a partial indemnity basis against 215 and 272.

9. I enclose a copy of the moving party's cost outline. The time spent dealing with and the docketed time attributable to Mississauga and Peel.

Dated: September 19, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in cursive script, appearing to read "Leo Klug", written in black ink.

Leo Klug, of Counsel for the Respondents
(Moving Parties)

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COST OUTLINE
OF THE RESPONDENTS (MOVING PARTIES)

The *Respondents (Moving Parties)* provide the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)	\$	18,509.40
Estimated counsel fee for appearance	\$	
Disbursements (as detailed in the attached appendix)	\$	<u>339.00</u>
Total	\$	18,848.40

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the complexity of the proceeding

- the importance of the issues

- the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

- a party's denial of or refusal to admit anything that should have been admitted

- the experience of the party's lawyer

Leo Klug was called to the Bar in 1971; certified as a Specialist in Civil Litigation in 1989

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE*
<i>(e.g. pleadings, affidavits, cross-examinations, preparation, hearing etc.)</i>	<i>(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)</i>	<i>(specify the hours claimed for each person identified in column 2)</i>	<i>(specify the rate being sought for each person identified in column 2)</i>	
Preparation of Motion Record of 2156775 Ontario Limited dated Feb. 17, 2023 to lift the stay	L. Klug	7.25	350.00	500.00
Transcribing Motion Record and Affidavit and compiled Motion Record; serving all parties; preparation of Request Form and submitting to the Commercial List	Law Clerk	2.25	85.00	125.00
Attending Case Management Conference before the Honourable Justice Steele on March 9, 2023	L. Klug	1.00	350.00	500.00
Review Motion Record of the City of Mississauga dated April 13, 2023	L. Klug	2.65	350.00	500.00
Drafting Motion Record in response dated April 27, 2023	L. Klug	3.00	350.00	500.00

Transcribing Affidavit of Mr. D'Angelo and compiling Responding Motion Record; serving all parties and filing	Law Clerk	2.25	85.00	125.00
Reviewing Motion Record of the Region of Peel dated May 3, 2023	L. Klug	2.75	350.00	500.00
Reviewing Supplementary Motion Record dated May 12, 2023 from the Region of Peel	L. Klug	0.85	350.00	500.00
Drafting Second Supplementary Motion Record dated July 12, 2023	L. Klug	5.25	350.00	500.00
Transcribing Affidavit of Mr. D'Angelo and compiling Second Supplementary Motion Record (3 parts); serving all parties and filing	Law Clerk	5.50	85.00	125.00
Drafting Factum and updating case law	L. Klug	4.75	350.00	500.00
Reviewing Factum and Brief of Authorities dated July 17, 2023 served on behalf of City of Mississauga	L. Klug	4.50	350.00	500.00
Reviewing Motion Record Brief of Authorities dated July 18, 2023 served on behalf of Region of Peel	L. Klug	3.75	350.00	500.00
Preparation of Cost Outline	L. Klug	1.00	350.00	500.00
Transcribed Cost Outline	Law Clerk	0.50	85.00	125.00
Estimated time to prepare for motion	L. Klug	5.00	350.00	500.00
Attend in court to argue motion on July 24, 2023	L. Klug	2.50	350.00	500.00

SUMMARY

L. Klug	44.25 hours x \$350.00/hr. -	\$15,487.50
Law Clerk	10.50 hours x. \$85.00/hr. -	\$ 892.50
		\$16,380.00
	H.S.T. @ 13%	\$ 2,129.40
		\$18,509.40

*Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: July 21, 2023


Signature of lawyer

APPENDIX

Paid to file Motion Record

\$339.00

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Proceedings commenced at Toronto

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