



[2] A three day trial was held on April 20, 22 and October 8, 2015. Ms. Wexler was self-represented at the trial. The CCC was represented by counsel. Deputy Judge Gouin dismissed Ms. Wexler's claim for \$2,525.14.

[3] Ms. Wexler argues that Deputy Judge Gouin exceeded his jurisdiction by awarding \$20,000 in costs against her and that he erred in law by applying irrelevant considerations to award costs.

[4] The CCC argues that the costs' decision is highly discretionary, well-reasoned, anchored in jurisprudence and reveals no error in principle. Having adjudicated a three-day trial, the trial judge was in the best position to make a fair and reasonable costs order that accords with:

- (i) the *Rules of The Small Claims Court*, O. Reg. 258/98 (the "Rules");
- (ii) the principle that costs normally follow the events;
- (iii) the principle of what is fair and reasonable in the circumstances; and
- (iv) in the interests of justice itself.

[5] The Appellant seeks the following:

- (1) an order that the Costs award of the Small Claims Court dated February 28, 2016 be set aside;
- (2) costs for this appeal
- (3) costs for the successful motion for leave to appeal dated June 22, 2016; and
- (4) such further and other relief as counsel may seek and this Court permits.

### **Issue**

[6] Did Deputy Judge Gouin err when he issued his costs award against Ms. Wexler?

### **Analysis**

[7] The Supreme Court of Canada and the Court of Appeal have established the test for interfering with an award of costs; a court should only set aside an award of costs on appeal if the trial judge made an error in principle or if the costs award is plainly wrong (*McDowell v.*

*Baker*, 2012, ONCA 827, at para 17 and *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, at para 27.

[8] It is also important to note the standard of review for decisions in the Small Claims Court is outlined in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. At paragraphs 8 and 10, the Supreme Court states:

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness... The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error". Where the matter is one of mixed fact and law, the standard of review is whether the judge made a palpable and overriding error (para 36).

[9] A review of the legislation and the rules regarding an award of costs is also required. Section 29 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43 ("CJA") provides a limit of an award of costs in Small Claims Court. Section 29 states as follows:

An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding [emphasis added].

[10] In addition, Rule 19.02 of the *Rules* states "[a]ny power under this rule to award costs is subject to section 29 of the Courts of Justice Act, which limits the amount of costs that may be awarded." Rule 19.06 provides "[i]f the court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to another party".

[11] The Divisional Court reviewed the question of costs in *Stewart v. Toronto Standard Condominium Corporation No. 1591*, 2014 ONSC 795. The court's jurisdiction to hear an application for judicial review in these circumstances is, however, "a "limited and narrow" one that will generally arise only in exceptional circumstances such as bias, a breach of the principles of natural justice or an excess of jurisdiction" (para. 2).

[12] In *Stewart*, the Divisional Court determined:

rule 19.06, when it refers to “otherwise acting unreasonably”, must be interpreted as referring to the conduct of a party within the proceeding [emphasis added]. The rule is not intended to give the Small Claims Court a broad and unfettered discretion to make awards of compensation regarding the conduct of a party that is unrelated to the matter over which the Small Claims Court has jurisdiction. This interpretation is also consistent with the wording of s. 29 of the Courts of Justice Act, to which all of the Small Claims Court rules are subject, that makes it clear that the conduct to be considered when assessing a penalty is conduct in the proceeding.

[13] After having reviewed the legal framework, we must first review the Condominium Corporation’s Declaration X in this matter. The Indemnification provision states:

Each owner shall indemnify and save harmless the corporation from and against any loss, costs, damages, injury or liability whatsoever which the corporation may suffer or incur resulting from or cause by an act or omission of such owner, his family or any member thereof, any other resident of his unit or any guests, invitees or licencees of such owner or resident to or with respect to the common elements and/or all other units, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the corporation.

[14] Section 29 of the *CJA* is the first step in the legal analysis. The 15% rule should apply unless Deputy Judge Gouin considered it necessary in the interests of justice to penalize Ms. Wexler for unreasonable behaviour in the proceeding. Deputy Judge Gouin makes certain findings in Ms. Wexler’s case. He comments: “I allowed the plaintiff to produce those documents as I wanted to ensure that all the facts were before me; she was not assisted by a lawyer and did not know the rules of the court” (para 13). He also finds that she was not a vexatious litigant (para 16). Deputy Judge Gouin concludes:

I recognize that the plaintiff was not prepared for trial and that she was disorganized; this directly contributed to unnecessarily prolonging the trial. As such, and because her action was dismissed and because the condominium corporation has a Declaration, By-Laws and Rules providing for full indemnity, and especially because it would be unfair that the unit owners should bear all the costs of this litigation when the condominium corporation is unnecessarily sued, I allow costs in the amount of \$20,000.00 inclusive of HST and disbursements. In arriving at this

conclusion, I have also considered the principle of proportionality (para 18).

[15] Based on his comments and decision, Deputy Judge Gouin concludes that Ms. Wexler was not assisted by a lawyer, she did not know the rules of the court, she was not a vexatious litigant even though she was not prepared for trial and was disorganized which led to unnecessarily prolonging the trial. This does not meet the s. 29 of the *CJA* part of the test to penalize a party for unreasonable behaviour in a proceeding.

[16] Deputy Judge Gouin also awards costs above the 15% because of the language in the Condominium Corporation's Declaration X and it would be unfair that the unit owners should bear the costs of this litigation. In *Pearson v. Carleton Condominium Corporation No. 178*, 2012, ONSC 3300, the corporation submitted that the Condominium Corporation's Declaration permitted it to recover all legal costs incurred related to the litigation by adding these costs to the common expenses of Pearson's unit. The language in the Declaration in *Pearson* is very similar to that of this case. Mr. Justice Smith concluded that the article in the Condominium Corporation's Declaration did not apply in that case because there had been no loss, damage or injury to the common elements caused by any act or omission by Ms. Pearson. I come to the same conclusion in Ms. Wexler's case; Declaration X is not applicable as there has been no loss, costs, damage, injury or liability suffered or incurred with respect to the common elements and/or all other units caused by an act or omission by Ms. Wexler.

[17] Lastly, Deputy Judge Gouin also comments that he considered the principle of proportionality. This is an important principle to keep in mind when dealing with the costs of a Small Claims Court matter. However, it is not determinative of the issue since Deputy Judge Gouin did not provide any further reasoning as to his considerations. In fact, his decision to award such a large amount in an award of costs is not proportional to the amount claimed by Ms. Wexler.

### **Conclusion**

[18] Based on my analysis above, I conclude that Deputy Judge Gouin erred in awarding costs in the amount of \$20,000.00 inclusive of HST and disbursements.

[19] The appeal is therefore allowed and the award of costs is reduced to 15% of Ms. Wexler's claim for \$2,525.14 as per s. 29 of the *CJA*.

[20] Consequently, I order as follows:

- (1) this appeal is allowed; and
- (2) Deputy Judge Gouin's award of costs is set aside and replaced with an award of costs in the amount of 15% of Ms. Wexler's claim for \$2,525.14.

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Justice M. O'Bonsawin

**Released:** September 25, 2017

**CITATION:** *Norma Wexler v. Carleton Condominium Corporation No. 28* 2017 ONSC 5697  
**DIVISIONAL COURT FILE NO.:** 16-2223  
**DATE:** 2017/09/25

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**B E T W E E N:**

Norma Wexler

Plaintiff (Appellant)

– and –

Carleton Condominium Corporation No. 28

Defendant (Respondent)

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**REASONS FOR DECISION**

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O'Bonsawin J.

**Released:** September 25, 2017