

## COURT OF APPEAL FOR ONTARIO CLARIFIES THE AUTHORITY TO ORDER NON-PARTY COSTS

by Robert Macdonald

### Overview

On March 3, 2017, the Court of Appeal for Ontario released its decision in *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184.

The decision is important to civil litigators across Canada as the court:

- (a) confirmed that the court has always had the power under statute and its inherent jurisdiction to order costs against a non-party;
- (b) clarified the two sources of the court's jurisdiction to order non-party costs;
- (c) restated and clarified the "person of straw" test, which stems from section 131 of *Courts of Justice Act*; and,
- (d) clarified the circumstances under which the court can invoke its inherent jurisdiction and order non-party costs.

Whereas past decisions have demonstrated ambiguity over when and how the court can order non-party costs, this decision offers a clear statement on the court's authority and the circumstances in which non-party costs may be ordered.

### The Trial Decision

1318847 Ontario Limited ("**131**"), and its principal and shareholder, Emmanuel Azzopardi, commenced two separate actions against Laval Tool & Mould Ltd. ("**LTM**"). LTM was a family business, founded by Azzopardi's late father and operated by some of his siblings.<sup>1</sup> 131 claimed damages for breach of contract and unjust enrichment arising out of tax consulting services that Azzopardi allegedly performed for LTM. Both actions were tried together.

The trial judge found no evidence to support allegations that LTM had contracted with either 131 or Azzopardi, or that 131 had ever performed any services for LTM. The only connection between 131 and LTM was Azzopardi's decision to invoice LTM through 131 for his own personal income tax purposes<sup>2</sup>.

The use of 131 as a plaintiff was based on Azzopardi's mistaken view that he could advance a claim for tax services performed in his personal capacity through any



[Robert Macdonald](#)

Partner

t: 647.729.0754

[macdonald@foglers.com](mailto:macdonald@foglers.com)

<sup>1</sup> *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, para. 3.

<sup>2</sup> *ibid*, para. 7.

corporate entity with which he was associated<sup>3</sup>. According to the court, neither Azzopardi or 131 were entitled to assert a claim based on the principles of *quantum meruit* and unjust enrichment<sup>4</sup>. As a result, the trial judge dismissed both actions.

LTM asked that costs be awarded against Azzopardi personally in the first action, in which only 131 was the plaintiff.

The trial judge declined to order costs against Azzopardi personally. He cited section 131 of the *Courts of Justice Act*, which states:

*Subject to the provisions of an Act or rules of court, 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.*

The trial judge held that, in light of the language of section 131, the court's authority to order non-party costs was restricted to the parties to a proceeding<sup>5</sup>.

However, referring to the case law that followed the High Court's 1911 decision in *Re Sturmer and Town of Beaverton*<sup>6</sup>, he also acknowledged that costs may be awarded against non-parties where the non-party is "the real litigant" and, in an attempt to avoid liability for costs, puts forth a "man of straw" to prosecute the litigation<sup>7</sup>. Citing the evidence before him, the trial judge held that Azzopardi was not a "man of straw", as his motive for using 131 to sue LTM was to avoid tax consequences, not to avoid a cost award in the litigation<sup>8</sup>.

### **The Court of Appeal's Conclusion on Past Case Law**

The Court of Appeal highlighted that, since *Sturmer*, there has been considerable ambiguity in the case law as to whether the court possesses the inherent jurisdiction to order non-party costs.

As a result, the Court of Appeal proposed to use its decision in *1318847 Ontario Limited v. Laval Tool & Mould Ltd.* to untangle the two sources of the court's jurisdiction to order non-party costs, explain how the distinct powers interact, and give guidance on how each may be exercised.

### **The Court's Statutory Jurisdiction to Order Non-Party Costs**

The Court of Appeal held that any assessment of the appropriateness of ordering non-party costs must begin by considering the court's statutory jurisdiction under section 131 of the *Courts of Justice Act*.

The court confirmed that section 131 limits the court's discretion to order costs against named parties unless the following elements of the "person of straw" test are each satisfied:

1. The non-party has status to bring the action;
2. The named party is not the true litigant; and

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<sup>3</sup> *ibid.*, para. 8.

<sup>4</sup> *ibid.*, para. 9.

<sup>5</sup> *ibid.*, para. 11.

<sup>6</sup> (1911), 25 O.L.R. 190 (H.C.) ("*Sturmer*")

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*, paras. 12 and 13.

3. The named party is a person of straw put forward to protect the true litigant from liability for costs.

The Court of Appeal stated that "man of straw" test had to be analyzed by deciding whether the "intention, purpose or motive of the non-party in putting the named party forward was to avoid liability for costs"<sup>9</sup>. Further, the court said that the "man of straw" test 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 for costs"<sup>10</sup>.

### **The Court's Inherent Jurisdiction to Order Non-Party Costs**

The Court of Appeal confirmed that superior courts have inherent discretionary jurisdiction to order non-party costs in situations where the non-party has initiated or conducted litigation in a way that amounts to an abuse of process<sup>11</sup>.

Courts or tribunals lacking inherent jurisdiction may only order non-party costs if they have statutory jurisdiction<sup>12</sup>.

The court was also careful to note the limits on the court's inherent jurisdiction. It cannot be exercised in a manner contrary to statute, or where the legislature has used "clear and precise statutory language" to exclude it<sup>13</sup>. The court held that the power to order non-party costs does not conflict with the statutory authority granted under section 131 of the *Courts of Justice Act* because the language in section 131 is "permissive".<sup>14</sup>

The Court of Appeal set out some established situations where the court can order non-party costs:

1. where non-parties engage in an abuse of process;<sup>15</sup>
2. where non-parties have engaged in conduct that amounts to the tort of maintenance<sup>16</sup>; and,
3. exceptional circumstances where non-party directors, shareholders or principals of corporations commit an abuse of process<sup>17</sup>.

The court also left the door open for additional situations where orders for non-party costs may be appropriate:

*Situations of gross misconduct, vexatious conduct, or conduct by a non-party that undermine the fair administration of justice other than those discussed above can be envisioned<sup>18</sup>.*

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<sup>9</sup> 1318847 *Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, para. 61.

<sup>10</sup> *ibid*, para. 64.

<sup>11</sup> *ibid*, para. 65 - 66.

<sup>12</sup> *ibid*, para. 67.

<sup>13</sup> *ibid*, para. 68.

<sup>14</sup> *ibid*, para. 69 - 71.

<sup>15</sup> *ibid*, paras. 72 – 74.

<sup>16</sup> *ibid*, para. 75.

<sup>17</sup> *ibid*, para. 77.

<sup>18</sup> *ibid*, para. 76.

Parties are cautioned that if they intend to seek costs against a non-party, the non-party should be put on notice:

*as a matter of procedural fairness, non-parties must be given notice of a litigant's intention to seek a costs award against them: St. James' Preservation Society, at paras. 48-55. The inquiry into whether there has been adequate notice is a contextual one driven by the circumstances of each case, but, in most cases, unequivocal notice of a litigant's intention to seek costs from a non-party should be given as soon as reasonably possible prior to the hearing: see Middlesex Condominium, at para. 44<sup>19</sup>.*

### **The Result**

The Court of Appeal allowed the appeal, and remitted the matter back to the trial judge to fix costs against Azzopardi personally.

This decision will be helpful to parties (and their counsel) who find themselves defending an action that is being driven by someone other than the named plaintiff. Non-parties cannot shelter themselves from the court's authority, and may be subject to a cost award based on their conduct.

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<sup>19</sup> *ibid*, para. 79.