

LEGAL BULLETIN

# ISSUE NO. 29

## Judicial Responses to Litigation Abuse: Cost Awards

*Kumar v Nash, 2024 ONCJ 16*

### Introduction

Litigation abuse has been defined as a “pattern of conduct that misuses the Family Court process in a way that could reasonably be expected to cause emotional or financial harm to the other party or their children which is greater than would occur with the proper use of the family justice process.”<sup>1</sup> While consideration of litigation abuse may arise in cases involving parenting issues, disapprobation of such abusive tactics in Ontario courts occurs primarily through the use of costs orders.<sup>2</sup>

Cost awards play a crucial role in censuring inappropriate litigation behaviour, obligating a party

litigation process to pay some or all the opposing party’s litigation costs.<sup>3</sup> Although the Ontario *Family Law Rules (FLR)*<sup>4</sup> do not specifically reference “litigation abuse”, when assessing costs, courts routinely consider whether cases involve conduct that is “unreasonable”, in “bad faith” or vexatious.<sup>5</sup>

This legal bulletin examines *Kumar v Nash*,<sup>6</sup> a case where the Court found that the father acted in bad faith and took unreasonable positions during the legal proceedings.<sup>7</sup> By issuing cost awards to address and sanction the father’s abusive litigation tactics, this case provides a clear example of the court’s disapproval of such conduct in the family law context, thereby providing a useful tool for victims of family violence seeking to deter corrosive litigation behaviour.



### Background

In *Kumar v Nash*, both the mother and father presented parenting motions to the Court on December 1, 2023 concerning their 2-year-old son.<sup>8</sup> Significantly, the father also sought a restraining order against the mother’s counsel and the removal of the mother’s counsel from the case.<sup>9</sup> Ultimately, the Court ruled in favour of the mother, granting the mother’s motion which requested that the father’s parenting time with the child be supervised. The Court also granted communication and non-contact orders sought by the mother.<sup>10</sup> The father’s motion was dismissed. The mother was therefore the successful party, and as such, presumptively entitled to costs.<sup>11</sup>

<sup>1</sup> Bala et al, “Exploring Litigation Abuse in Ontario: An Analysis of Costs Decisions” (2024) Fam Ct Rev (in press). (Note: pages 5-6 of pdf)

<sup>2</sup> *Ibid* at 16.

<sup>3</sup> *Ibid*.

<sup>4</sup> O Reg 439/07, s 1 [FLR].

<sup>5</sup> Bala et al, *supra* note 1 at 17.

<sup>6</sup> 2024 ONCJ 16 [*Kumar v Nash*].

<sup>7</sup> *Ibid* at paras 20, 50.

<sup>8</sup> *Ibid* at para 1.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

On December 4, 2023, the father brought a Form 14B motion, requesting the Court to either set aside the Order of December 1, or rehear his motion.<sup>12</sup> On December 13, 2023, the Court dismissed the father's motion, endorsed the mother's entitlement to costs, and mandated that the father obtain permission from the court before filing another motion.<sup>13</sup> Undeterred, on December 14, 2023, the father submitted another Form 14B motion seeking leave to bring a motion for the same relief, which the Court dismissed on December 22, 2023.<sup>14</sup> The Court criticized the father's conduct, stating it bordered on an abuse of process, and imposed costs of \$565, along with restrictions on the documents he could file before the next court date.<sup>15</sup>

The mother then sought full recovery costs for the December 1, 2023, motions and the December 4, 2023, Form 14B motion, alleging bad faith on the part of the father.<sup>16</sup> Additionally, she requested an order prohibiting the father from filing any documents until his costs were paid in full.<sup>17</sup>

## Analysis of the Issues

In his decision, the Honourable Justice Sherr reviewed the four fundamental purposes modern costs rules are designed to achieve:

- a) to partially indemnify successful litigants;
- b) to encourage settlement;
- c) to discourage and sanction inappropriate behaviour by litigants and;
- d) to ensure that cases are dealt with "justly" under the FLR.<sup>18</sup>

Justice Sherr affirmed that costs may be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. He went on to state that costs awards are discretionary and that two important principles in the courts' exercise of discretion are reasonableness and proportionality.<sup>19</sup>

### ***Bad Faith***

In considering the mother's allegations of bad faith, Justice Sherr referred to legal precedent which states that bad faith is defined by situations in which an individual knowingly and intentionally represents their actions as serving one purpose while actually intending another.<sup>20</sup> Subrule 24(8) of the *FLR* stipulates that if a party is found to have engaged in bad faith, the court must determine costs on a full recovery basis and order immediate payment by the offending party. However, due to the high threshold of egregious behaviour, findings of bad faith are rare.<sup>21</sup>

In this case, the Court found that the father had acted in bad faith regarding his motion for a restraining order against the mother's counsel and an order removing her counsel from the record.<sup>22</sup> He made unwarranted allegations against the mother's counsel, accusing her of fabricating evidence and using the police to keep him away from his child.<sup>23</sup> Among other things, the Court suggested that the father's relentless volume of communications with the mother's counsel were indicative of someone with mental health or personality challenges. He also found that the father's frequent calls to the police, Children's Aid Society, attempts to remove mother's counsel from the record and threats to lay charges against her were all "flashing red lights of a controlling and coercive person".<sup>24</sup> Justice Sherr emphasized that such malicious attacks, lacking evidentiary foundation, cannot be tolerated by the court.<sup>25</sup> These actions undermine the integrity of and respect for the administration of justice, warranting serious costs consequences.<sup>26</sup> Justice Sherr also expressed concern about the effect of such unwarranted allegations on family law lawyers and the "chilling effect" on lawyers who seek to provide access to justice for vulnerable litigants.<sup>27</sup>

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<sup>12</sup> *Ibid* at para 3.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* at para 4.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* at para 5.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* at para 7, citing *Mattina v Mattina*, 2018 ONCA 867.

<sup>19</sup> *Ibid* at paras 8–9.

<sup>20</sup> *Ibid* at para 14.

<sup>21</sup> *Ibid* at para 13.

<sup>22</sup> *Ibid* at para 20.

<sup>23</sup> *Ibid* at para 21.

<sup>24</sup> *Ibid* at para 22.

<sup>25</sup> *Ibid* at para 24.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid* at para 25.

## ***Failure to Accept an Offer to Settle***

Subrule 18(14) of the FLR sets out the cost consequences of a party's failure to accept an offer to settle when the other party obtains an order that is as good as or better than the offer made by that party. The rule specifies that, unless the court directs otherwise, the party making the successful offer is entitled to costs from the date the offer was served, and complete cost recovery from that date, provided the following conditions are fulfilled:

1. If the offer relates to a motion, it is made at least one day before the motion date.
2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
3. The offer does not expire and is not withdrawn before the hearing starts.
4. The offer is not accepted.
5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.<sup>28</sup>

In this case, Court found that the mother's severable offer to settle, dated November 28, 2023, was as favourable or more favourable to the father than the motions result on all but one severable issue.<sup>29</sup> Consequently, the mother was held to be entitled to her costs up until November 28, 2023, and her full recovery costs after that date.<sup>30</sup>

## ***Quantum of Costs***

Similar to an order for full recovery costs arising from bad faith, an award of full recovery costs arising from the applicability of subrule 18(14) does not guarantee that the mother will receive the full amount of costs claimed.<sup>31</sup> According to subrule 24(12) of the *FLR*, in setting the amount of costs, the court shall consider:

- (a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
  - (i) each party's behaviour,
  - (ii) the time spent by each party,
  - (iii) any written offers to settle, including offers that do not meet the requirements of rule 18,
  - (iv) any legal fees, including the number of lawyers and their rates,
  - (v) any expert witness fees, including the number of experts and their rates,
  - (vi) any other expenses properly paid or payable; and
- (b) any other relevant matter.

Reviewing the relevant case law, the Court noted that conduct which unduly complicates or unduly lengthens and increases the cost of a proceeding constitutes unreasonable conduct under the above subrule.<sup>32</sup> A party who persists in advancing unreasonable claims or arguments may attract high or full recovery costs and although ability to pay is a relevant consideration, it will be less of a mitigating factor when the impecunious party has acted unreasonably or where their claim was illogical or without merit.<sup>33</sup>

In this case, the Court found that while these motions were not complex, they were made more difficult due to the father's unreasonable positions and his "flurry of litigation".<sup>34</sup> The Court determined that, while the mother acted reasonably, the father's actions, including an unrealistic motion seeking primary residence and decision-making responsibility for the child and "bombarding" the mother's counsel with emails, were unreasonable.<sup>35</sup>

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<sup>28</sup> *FLR*, *supra* note 4 at subrule 18(4).

<sup>29</sup> *Kumar v Nash*, *supra* note 6 at para 36.

<sup>30</sup> *Ibid* at para 37.

<sup>31</sup> *Ibid* at para 38.

<sup>32</sup> *Ibid* at para 41.

<sup>33</sup> *Ibid* at para 41.

<sup>34</sup> *Ibid* at para 48.

<sup>35</sup> *Ibid* at paras 50–52.

Taking into account the father's financial circumstances and his belated acknowledgement of his unreasonable behaviour in his costs submissions,<sup>36</sup> the Court ordered the father to pay the mother a total of \$10,000 in costs.<sup>37</sup> This amount encompassed costs related to bad faith (specifically, \$3,000 which the Court ordered to be paid immediately), as well as costs for the December 1, 2023 motions, and the December 4, 2023 Form 14B motion.<sup>38</sup>

## Takeaways

This case highlights the ability of Ontario courts to addressing instances of litigation abuse through the judicious use of cost awards, providing a protective framework for victims of family violence. This approach is consistent with the insightful perspective articulated by Justice Chappel in *Levely v Levely*:<sup>39</sup>

The court has a critical responsibility and role to play in ensuring that proceedings which are intended to protect families and lead to resolution of pressing and emotionally divisive issues are not hijacked by a party and transformed into a process for further victimizing the other party and the children in their care.<sup>40</sup>

In *Kumar v Nash*, the Court effectively aligns with this perspective, utilizing the mechanism of costs to address the misuse of legal proceedings, and in doing so, assists in mitigating the negative experiences of victims of family violence within the family court system.

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<sup>36</sup> While giving the father the benefit of the doubt and indicating that he had partially mitigated his unreasonable behaviour by acknowledging same in his cost submissions, the Court noted that it remained to be seen whether he would, in fact, change his conduct (*Ibid* at para 55).

<sup>37</sup> *Kumar v Nash*, *supra* note 6 at paras 56–63.

<sup>38</sup> *Ibid*.

<sup>39</sup> 2013 ONSC 1026.

<sup>40</sup> *Ibid* at para 12.

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