ONTARIO COURT OF JUSTICE

COURT FILE No.: D 79/13

B E T W E E N :

Mari-Claire Watkins
Applicant

— AND —

Michael Foley
Respondent

Costs Endorsement upon Written Submissions

Erika MacLeod ..... counsel for Mari-Claire Watkins
Taryn Simionati ..... counsel for Michael Foley

CASPERS, J.:

1: INTRODUCTION

1. The Motions to Change[1] before the court brought by Mari-Claire Watkins ("Ms. Watkins") and Michael Foley ("Mr. Foley"), at their essence, deal with the singular issue of the academic future of their 15 year old daughter, Michaela Watkins, born August 29, 2002 ("Michaela") – where she will attend school, who will make the necessary educational decisions and who will pay, and in what proportion, the scholastic costs.

2. On November 5, 2013 the parties entered into a consent order as follows:

> "(1) Michael Foley shall pay child support for the child, Michaela Watkins born August 29, 2002 in the amount of $600.00 based on a minimum of $65,000.00 per year and in accordance with the Child Support Guidelines;
>
> (2) Mari-Claire Watkins and Michael Foley will provide their tax returns including income statement and Notice of Assessment by May 30th every year or as soon after May 30th as it is received commencing in 2014;

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[1] Volume 2, tab 5 and Volume 4, tab 14.

(3) If Michael Foley's income for child support purposes is greater than $65,000.00 as recorded at line 150 of his income tax return for the preceding year, child support will be adjusted in accordance to the child support guidelines. Such adjustment will commence on June 1st of that year;

(4) The Respondent Michael Foley, agrees to pay the following extraordinary expenses:
-100% of orthodontic expenses;
- 75% of all extraordinary expenses going forward including but not limited to various sports, dance, and summer camps, on an ongoing basis as requested by the child, Michaela Watkins born August 29, 2002, and mutually agreed upon by both the Applicant, Mari-Claire Watkins, and the Respondent, Michael Foley. Both Mari-Claire Watkins and Michael Foley will provide their share of payment within 30 days of receiving the invoice;
-The Respondent, Michael Foley, will not be called upon to contribute to ongoing tuition expenses on behalf of the child, Michaela Watkins born August 29, 2002, at the Trillium Waldorf School;
-The Applicant, Mari-Claire Watkins, will not be called upon to contribute to expenses resulting from the child's, Michaela Watkins born August 29, 2002, private musical education;

(5) Mari-Claire Watkins and Michael Foley shall have joint custody of the child, Michaela Watkins born August 29, 2002 with the primary care and residence remaining with the Applicant, Mari-Claire Watkins;

(6) The Respondent, Michael Foley, shall have reasonable access on reasonable notice;

(7) The Payor, Michael Foley, shall provide the Recipient, Mari-Claire Watkins, in writing and within 7 days of any change in employment status, whether it be full-time or part-time, and shall provide full particulars including but not limited to the name, address and telephone number of the employer, the hourly wage received, the projected annual income, hours worked per week, and details of any benefits to which the payor, Michael Foley, is entitled;

(8) This order bears post-judgment interest at the rate of 3% per year effective from the date of this order. Where there is a default in payment, the payment in default shall bear interest only from the date of default;

(9) Unless this order is withdrawn from the Director's office, at the Family Responsibility Office, it shall be enforced by the Director and amounts owing under the order shall be paid to the Director, who shall pay them to the person to whom they are owed."

3. Both parties in their respective Motions to Change seek to vary that order.

2: BACKGROUND

4. Michaela has attended the Trillium Waldorf School for 11 years. She graduated from grade 8 in June, 2017 and is now 15 years of age. Pursuant to the prevailing order of November 5, 2013, all tuition costs associated with the Trillium Waldorf School were the sole responsibility of Ms. Watkins[2]. Those costs totalled approximately $12,000.00 annually[3]. Other catalogued expenses were shared between the parties.

5. Following graduation, Michaela, expressed a desire to attend grade 9 at High Mowing School located in Wilton, New Hampshire, USA ("High Mowing"). This is

[2] Paragraph 4.
[3] Volume 1, tab 1.

the only Waldorf boarding high-school in North America. It was disclosed to the court that in an unusual step, High Mowing offered Michaela a full scholarship for tuition and board. She was one of a very few, if not the only student internationally, to be recognized as the recipient of such an honour in the school's 75 year history and was chosen over a number of American students.[4] The scholarship awarded to Michaela for the 2017-18 academic year was approximately $53,000.00 (USD).Ms. Watkins encouraged her daughter to pursue her studies internationally. Both parents agree that Michaela is an accomplished young woman and a high academic achiever.

6. As the parties functioned under a joint custody parenting regime which required the participation of both parents in this educational enterprise, Mr. Foley was required to give his consent before the application/registration process for High Mowing could be finalized. Mr. Foley refused to provide his consent. Ms. Watkins was therefore compelled to commence a Motion to Change wherein she sought the following relief:

    - That she would have sole custody of Michaela;
    - That Mr. Foley would have reasonable access upon reasonable notice;
    - That Mr. Foley would pay his proportionate share, being 90%, of the costs associated with Michaela's attendance at High Mowing beyond those costs covered by any scholarship she might receive. [The total uncovered portion of those costs totaled $4340.00 USD ($5640.00 CND) at the outset of this proceeding and included costs associated with a student visa, commitment fee, health insurance, US cellular, technology and travel[5]];
    - That she would have sole signing authority for all consents, legal documents and passport applications pertaining to Michaela; and
    - That Mr. Foley would pay arrears in the amount of $420.00 for Michaela's horse training lessons.

7. Mr. Foley does not agree that Michaela needs to attend High Mowing. He presented other alternatives such as a GCVI Baccalaureate program available through a local high school in Guelph or a Waldorf School in Toronto.[6] Both he argues would provide sound academic education at a lower cost[7]. However, should it ultimately be determined that Michaela is to attend High Mowing to pursue her studies, he is prepared to offer "emotional support" and encouragement but he is not prepared to contribute financially to the costs.

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[4] Volume 2, tab 2, paragraph 5.
[5] Volume 2, tab 7, Exhibit "G".
[6] Volume 3, tab 12, pa. 43.
[7] Volume 2, tab 4, Exhibit "N".

8. In his Response to Motion to Change, Mr. Foley sought the following relief:

   - That Ms. Watkins' Motion to Change be dismissed;
   - That Ms. Watkins have sole custody of Michaela with respect to her attendance at High Mowing only;
   - That the parties have equal access with Michaela, or in the alternative that he has access on alternating weekends and that the holidays, including the summer, be shared equally;
   - That his child support terminate. Or, in the alternative, that there be a variation in his child support obligations such that he would not have to pay child support while Michaela is not resident with her mother. Child support should be paid only for the months of July and August annually while Michaela is attending school and in the amount of $323.00 per month based an annual income of $36,803.00.

9. Ms. Watkins commenced this proceeding on her own behalf without the benefit of counsel of record. Ms. MacLeod was retained in August, 2017. Ms. Simionati has been counsel of record for Mr. Foley throughout the proceeding.

10. Following discussions between the parties, with the assistance of their counsel late on the afternoon of November 1, 2017, the parties entered into Minutes of Settlement on all issues.

11. I granted the consent order and also set a timetable for counsel to provide written submissions on the issue of costs.

3: POSITION OF THE PARTIES ON THE ISSUE OF COSTS

12. Both parties have filed costs submissions.

13. Ms. Watkins seeks costs in the amount of $6220.65 on the basis that she was forced to commence the proceeding by way of an emergency motion, that she was successful with respect to the majority of the issues, that she engaged in reasonable behaviour throughout the litigation, that Mr. Foley acted in bad faith and that the costs claimed are excessive.

14. Mr. Foley claims legal fees, disbursements and HST of $28,379.95 on a substantial indemnity basis payable forthwith on account of costs incurred by him during the course of the proceeding. He claims full recovery costs as he submits that he conducted himself reasonably throughout the litigation, that Ms. Watkins engaged in bad faith behaviour and that Ms. Watkins failed to accept an offer dated June 19, 2017 which was more favourable than that which was ultimately negotiated.

15. To be clear, the costs submissions relate to both the interim motion and the two substantive Motions to Change.

4: GENERAL COST PRINCIPLES

Purpose of Costs Awards

16. In *Serra v. Serra* [2009] O.J. No. 1905 at para. 8, the Ontario Court of Appeal succinctly confirmed that costs rules are designed to foster three important principles:

> 1. to partially indemnify successful litigants for the cost of litigation;
>
> 2. to encourage settlement; and
>
> 3. to discourage and sanction inappropriate behaviour by litigants.

17. Sub-rule 2 (2) of the *Family Law Rules* adds a fourth fundamental purpose for costs: to ensure that the primary objective of the rules is met – that cases are dealt with justly. This provision needs to be read in conjunction with rule 24. [See: *Sambasivam v. Pulendrarajah*, 2012 ONCJ 711 (CanLII), [2012] O.J. No. 5404 (Ont. C.J.).]

18. There are always costs to litigation – emotionally, psychologically and financially. The right to bring or respond to a case does not grant a party the license to litigate in a manner that ignores the consequence of that litigation. Justice Carole Curtis emphasized this point in *Sabo v. Sabo* [2013] O.J. No. 4628 (O.C.J.) as follows:

> "Parties to litigation must understand that court proceedings are expensive, time consuming and stressful for all concerned. They are not designed to give individual litigants a forum for carrying on in whatever manner they may choose, oblivious to the impact of that conduct on the other side and, perhaps most importantly for the purposes of this case, oblivious to the mounting costs of the litigation."

19. As noted by Justice Sherr of this court in *L.W.-A. v. J.C and D.W.A.* 2017 ONCJ 825, at paragraph 5:

> "Modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. Costs can be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice. See: *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2002 S.C.C., supra, paragraph 25. When awarded on a full recovery scale, costs can serve to express the court's disapproval of unreasonable conduct during the litigation. See: *Sabo v. Sabo,* 2013 ONCJ 545 (CanLII), per Justice Carole Curtis."

20. Both parties have incurred significant legal fees in proportion to their disclosed incomes, in their pursuit of their individual litigation.

Rule 24 Family Law Rules

21. Subrule 24(1) creates a presumption of costs in favour of the successful party. Consideration of success is the starting point in determining costs. [See: *Sims-Howarth v. Bilcliffe,* 2000 CanLII 22584 (ON SC), [2000] O.J. No. 330 (SCJ- Family Court).] To determine whether a party has been successful, the court should take into account how the order compares to any settlement offers that were made. See: *Lawson v. Lawson,* 2008 CanLII 23496 (ON SC), [2008] O.J. No. 1978 (SCJ).

22. In *Mantella v. Mantella,* 2005, O.J. No. 3170 (O.S.C.J.) at paragraph 8, Justice Deena Baltman of the Superior Court of Justice wrote:

> "Rule 24 of the *Family Law Rules* presumes that the successful party will, barring unusual circumstances, recover at least substantial indemnity of their costs. There remains, however, significant discretion to award the amount of costs that appear just in all the circumstances, particularly after taking into account the various factors set out in Rule 24(11)."

Offers to Settle

23. Any determination of costs must take into account Offers to Settle and how they compare to the final resolution. In *Serra,* supra, Ontario Court of Appeal emphasized the important obligation imposed upon litigants to attempt to settle emergent issues that arise from the very beginning of a family law case. In doing so, it adopted the following statement by Spence J. in *Husein v. Chatoor* 2005 ONCJ 487 (CanLII) OCJ, at paragraph 30.

> "[P]arties have an obligation to begin to assess their respective cases at the outset of the litigation – even before the litigation commences – and to make all reasonable efforts to settle. Legal fees can create enormous financial burdens for litigants and it behooves neither party simply to sit back and to roll the dice while those fees continue to mount."

24. In this case both parties served Offers to Settle.

25. I have reviewed the Offers to Settle exchanged by the parties. There were three such offers - Ms. Watkins served an Offer to Settle dated July 6, 2017. Mr. Foley served Offers to Settle dated June 19, 2017 and July 28, 2017.

26. I am satisfied that final resolution arrived at on November 1, 2017 was overall more favourable to Ms. Watkins (on an issue-by-issue basis) than the terms of the Offers to Settle. The court is not required to examine each term of an Offer to Settle. As noted by Justice Pazaratz in *Chomos,* supra, at paragraph 19,

> "The court is not required to examine each term of the offer as compared to the terms of the order and weigh with microscopic precision the equivalence of the terms. What is required is a general assessment of the overall comparability of the offer as contrasted with the order (*Sepiashvili*

v. Sepiashvili, 2001 CarswellOnt 3459, additional reasons to 2001 CarswellOnt 3316 (SCJ); *Wilson v Kovalev* (supra)."

5: APPLICATION OF LEGAL PRINCIPLES TO THE FACTS

27. While Ms. Watkins was not entirely successful, I conclude nevertheless that she was the "successful party" and, as such, there is a presumption that she is entitled to the costs of her "case". I find that there was no unreasonable or bad faith behaviour on the part of Ms. Watkins. Notwithstanding that Mr. Foley submits that she failed to provide the ordered disclosure from High Mowing on two occasions, I am satisfied that she made efforts to do so and that she forwarded information which she believed to be sufficient, twice to Mr. Foley. There is no basis upon which to deprive her of costs to which she is entitled. For the same reason, there is no basis to order that she pay all or a part of Mr. Foley's costs. Ms. Watkins unquestionably enjoyed the preponderance of success on the motions and is therefore presumptively entitled to her costs.

Custody and Access

28. Ms. Watkins was successful in securing a sole custody order for the purpose of facilitating Michaela's attendance at High Mowing. This was not as broad or all-encompassing an order as she appeared to request in her Motion to Change but it is clear that from the outset her motivation for bringing this proceeding was to advance her daughter's admission to High Mowing. The fact that the ultimate consent order contemplated sole custody for the limited purpose of Michaela's schooling I find to be in accord with the initial intention of Ms. Watkins. While there may have been some issues associated with co-parenting from time to time which one might hope could have been resolved outside of the court process, the precipitating event for this proceeding was Mr. Foley's refusal to provide his consent for Michaela's application and registration to High Mowing and the actions he undertook which resulted in the withdrawal of the scholarship.

29. In conjunction with the custody order Ms. Watkins acquired sole signing authority for all consents, legal documents and passport applications pertaining to Michaela as she had requested.

30. There was no order regarding specified access as sought by Mr. Foley. Ms. Watkins sought confirmation of the status quo. Ultimately no order was made with respect to access given the circumstances and age of the child, but in practical terms the order of November 5, 2013 continues.

31. While it is argued from the perspective of Mr. Foley that these orders were ultimately made on consent and that he should receive credit for this, while that may be true to some limited degree, it is unfortunate for the family unit collectively that the Motion to Change had to be brought at all.

Arrears of S. 7 expenses

32. Ms. Watkins received in the final resolution retroactive arrears totalling $420.00 for Michaela's horse training lessons, as requested. This was confirmed in the temporary order of August 8, 2017 and confirmed in the final resolution of November 1, 2017.

Contribution to Educational Costs at High Mowing

33. The interrelationship between the "educational costs" and the "extraordinary expenses" for Michaela's attendance at High Mowing is confusing. These discreet terms have never been clearly defined. On June 21, 2017 Justice Brophy ordered, upon the consent of the parties,

> "(1) The Respondent, Michael Foley, shall have no responsibility for educational expenses at High Mowing School. The issue of extra-ordinary expenses remains outstanding."

Precisely what was intended by this paragraph is unclear. It was envisioned on June 1, 2017 that argument would be heard on the issue of Mr. Foley's contribution to the educational costs of High Meadow which *were* the extraordinary expenses at the heart of the proceeding. To say that Mr. Foley would have "no responsibility for educational expenses at High Meadow School" but then to note the "extra-ordinary expenses" as an outstanding issue yet to be resolved, is irreconcilable and ambiguous. The motion was adjourned by Justice Brophy to August 8, 2017 for argument. There is no record of Ms. Watkins having been assisted by duty counsel. Ms. Simionati attended on behalf of Mr. Foley.

34. On August 8, 2017 Mr. Foley was given leave to contact High Mowing directly to request production of documentation in support of Michaela's application for admission as he maintained that the documentation which was ordered to be provided by Ms. Watkins had not been produced. Ms. Watkins indicated that she had provided it on two occasions. Nothing further was dealt with regarding the outstanding "extra-ordinary expenses." The parties engaged in discussions. It appeared as if there was a resolution pending and so the matter was adjourned to August 28, 2017. On the return regrettably there was no resolution.

35. Mr. Foley did not wish to contribute to the costs of High Mowing. Ultimately he was unsuccessful. The final resolution does not say that Mr. Foley has no obligation to pay towards the costs of High Mowing School for Michaela. The final resolution as incorporated in the order of November 1, 2017 states as follows:

> 7. The Applicant shall be responsible for all expenses associated with Michaela's attendance at High Mowing School to include, but not limited to tuition, room and board, tutoring and additional fees if Michaela remains there *when High Mowing is closed."*

There are ancillary terms relating to medical and dental coverage. Nowhere does it state that Mr. Foley has no obligation to contribute to the s. 7 expenses relating to tuition, room and board and tutoring while Michaela is in attendance at the

school. Instead there is a separate section of the Minutes of Settlement which references Mr. Foley's obligation towards Michaela's educational costs:

> "11 For as long as Michaela is enrolled full time at High Mowing School, the Respondent shall pay the Applicant the following to account for his obligation towards child support and all of Michaela's section 7 expenses both associated with High Mowing School and outside of High Mowing School."

36. Ms. Watkins was successful in negotiating a contribution by Mr. Foley to Michaela's educational costs. She was not successful on the issue of a contribution to costs by Mr. Foley at the rate of 90%. Instead she appears to have received approximately 50% annually of any expenses not covered by any scholarship as follows:

- Year 1 - $2800.00
- Years 2 – 4 - $3000.00 annually.

37. On this issue there was some divided success as Mr. Foley had to make a contribution but it was not as much as Ms. Watkins was originally seeking. Nevertheless he is paying significantly more than he initially proposed, which amounted to nothing.

38. The final resolution also stipulates that Mr. Foley will pay directly into an account for Michaela at High Mowing the sum of $800.00 on September 1, of the years 2018, 2019 and 2020. Whether this is a separate amount or whether these payments flow from the annual contributions of $2800.00 in Year 1 and $3000.00 in Years 2-4 is unclear.

Child Support

39. Ms. Watkins did not raise the issue of ongoing child support.

40. Mr. Foley initiated the dialogue and sought a variation of the November 5, 2013 order in that regard. He wished his child support to terminate or, in the alternative, he sought to pay only for the summer months of July and August, when Michaela was at home, based on an income of $36,803.00 at the rate of $323.00 per month for a total annual ongoing child support commitment of $646.00. This request was made notwithstanding that the order of November 5, 2013 attributed to him a minimum annual income of $65,000.00.

41. It was ultimately agreed that Mr. Foley would pay child support as follows:

- Year 1 - $600.00 per month;
- Years 2-4 - $434.00 per month.

42. The final resolution was more favourable for Ms. Watkins. Child support continued in the amount of $600.00 monthly for Year 1 in accordance with the prevailing order

of November 5, 2013. Child support for Years 2 to 4, although reduced to $434.00 was payable year round.

43. The remaining issues to be addressed include (a) the scale on which costs are awarded, and (b) the quantum of costs.

Scale of Costs

44. There is nothing in the *Family Law Rules* that dictates the scale upon which costs are ordered.

45. I find that Ms. Watkins was the successful party based on the ultimate resolution achieved.

46. In making this decision, the court considered the factors set out in subrule 24 (11), which reads as follows:

> 24 (11) A person setting the amount of costs shall consider,
>
> (a) the importance, complexity or difficulty of the issues;
>
> (b) the reasonableness or unreasonableness of each party's behaviour in the case;
>
> (c) the lawyer's rates;
>
> (d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;
>
> (e) expenses properly paid or payable; and
>
> (f) any other relevant matter.

(a) Importance

47. The case was important for the parties. It was moderately complex. The ability for Michaela to attend High Mowing on a full scholarship and the urgency associated with the filing of the application for admission was of paramount importance to Ms. Watkins. The allocation of expenses for that attendance was of importance to both Ms. Watkins and Mr. Foley.

(b) Reasonableness

48. Ms. Watkins and Mr. Foley each asked the court to make a finding that the other acted in bad faith pursuant to subrule 24 (8)[8]. Subrule 24 (8) reads as follows

> Bad Faith
>
> 24 (8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

[8] Submissions of Mr. Foley, paragraphs 15, 18-20. Submissions of Ms. Watkins, paragraph 24.

49. Subrule 24 (8) requires a fairly high threshold of egregious behaviour, and as such a finding of bad faith is rarely made. See: *Cozzi v. Smith,* 2015 ONSC 3626 (CanLII); *Scipione v. Del Sordo*, 2015 CarswellOnt 14971 (Ont. SCJ).

50. In *L.W-A. v J.C. and D.W.A. supra,* Justice Sherr highlighted the difference between bad faith and unreasonable behaviour.

> "There is a difference between bad faith and unreasonable behaviour. The essence of bad faith is when a person suggests their actions are aimed for one purpose when they are aimed for another purpose. It is done knowingly and intentionally. See: *S. (C.) v. S. (M.)* (2007), 2007 CanLII 20279 (ON SC), 38 R.F.L. (6th) 315 (Ont. SCJ). Bad faith is not synonymous with bad judgment or negligence; rather, it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. Bad faith involves intentional duplicity, obstruction or obfuscation. [See: *Scipione, supra.*]

51. Indeed, as noted more recently by McGee, J. a finding of bad faith within rule 24(8) requires "evidence of an intention to deceive or mislead, or to cause harm to the opposing party, or, to act in a manner consistent with an ulterior motive." [*Malik v. Malik* 2016 ONSC 105 at paragraph 2, affirmed by the Ontario Court of Appeal at 2017 ONCA 163.]

52. The court also stated that bad faith is more than an objective view of bad judgment, and, further that it is no small thing to make a finding of bad faith.

53. In this proceeding, there is no evidence regarding the decisions or behaviour of either party that can be characterized as "bad faith."

54. While the court finds that Mr. Foley acted unreasonably on several occasions, it does not find that his behaviour rose to the high threshold of egregious behaviour which is required for a finding of bad faith.

55. I do find that Mr. Foley exhibited unreasonable behaviour for the following reasons:

    i. The issue of Michaela's attendance at High Mowing had been live since July, 2015. Mr. Foley had adequate opportunity to educate himself with respect to the issue of tuition fees and other ancillary costs. He was aware of how important it was to his daughter to attend High Mowing. An offer was extended to him to attend the school with Michaela in June, 2016. He declined. Ms. Watkins offered to deal with the registration and leave the financial issues to be worked out at a later date. Mr. Foley refused. This extended the proceeding[9]. The fact that Mr. Foley was unwilling to sign the consent for High Meadow, which ultimately set this proceeding in motion, is evidence of bad judgment.

[9] Volume 2, tab 2, paragraph 17.

ii. The parties came to an apparent resolution at the case conference held on August 8, 2017. The matter was adjourned to August 28, 2017 to finalize all aspects of the proceeding. When the Minutes of Settlement were received by Ms. Watkins, although the document contained some ancillary terms apparently not agreed to, more importantly Mr. Foley sought a blanket prohibition against Ms. Watkins ever bringing any motion to change in the future with respect to any "*...section 7 expenses associated with High Mowing School or outside High Mowing School*" or "*a change in ... child support obligations for Michaela.*" Ms. Watkins at the time was unrepresented. These terms attempted to usurp the role of the court. An execution of the August 8, 2017 Minutes of Settlement could have been highly prejudicial to Ms. Watkins. Ultimately these provisions were amended in the Minutes of Settlement upon which the final resolution was premised, to include a provision tying any variation to a material change in circumstances. This amendment more accurately reflected the state of the law and was negotiated only after Ms. Watkins obtained counsel.

56. I cannot find that Ms. Watkins was unreasonable in her desire to have counsel review the documentation. It was fortunate for her that she did so.

57. There were two orders with respect to which Ms. Watkins did not comply and I have taken that into account. I accept that she made her best efforts. Apparently she sent information to counsel for Mr. Foley twice. As I do not know precisely what documentation was delivered, I cannot make a finding that she acted in bad faith.

Quantum of Costs Awarded

(c), (d) and (e) Lawyer's Rates, Time Spent and Expenses

58. Both the rules and the case law acknowledge that the court has discretion over the quantum of costs to be paid. Section 131 of the *Courts of Justice Act* confirms that "the costs of an incidental to a proceeding or a step in the proceeding are in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid."

59. Ms. Simionati and Ms. MacLeod have each filed Bills of Costs.

60. There is no absolute requirement that a Bill of Costs must follow the "itemized by date and task" format. [*Chomos v. Hamilton* [2016] OJ No. 5211.] A detailed description of services with a lump sum fee is sufficient as between a solicitor and their client pursuant to section 2(3) of the *Solicitors Act*. A block fee description and summary may also be sufficient for determining costs as between parties, particularly where the case is straightforward and the amounts claimed are relatively modest. But Rule 24(11)(f) specifically requires a court dealing with a costs determination to consider the time properly spent on the case. The onus is

on the party seeking costs to establish that the quantum requested is appropriate, having regard to all of the Rule 18 and 24 considerations. Counsel requesting costs take their chances. The more details they provide in a Bill of Costs, the less likely they are to face the "insufficient particulars" argument.

61. The Bill of Costs filed by Ms. MacLeod is four pages in length and includes a detailed breakdown of the services rendered from August 22, 2017 to November 1, 2017. It clearly details the time spent on the case by her counsel, law clerk and administrative assistant. I find the Bill of Costs reasonable.

62. The dockets are detailed and allow the reader to understand

- the work done;
- the purpose for which the work was done;
- whether the work was completed by senior counsel, junior counsel, or the articling student and whether it was done efficiently;
- that there is no evidence of duplication of effort as between the timekeepers; and
- that the work was done by various timekeepers with a view to cost-effectiveness.

63. The Bill of Costs filed by Ms. Simionati references work completed by law clerks and students. However, it lacks specificity as argued by Ms. MacLeod in her Submissions.[10] For example, a block fee in excess of $10,000.00 billed for preparation for the June 1, 2017 motion, without context or elaboration, seems high.

64. The court considered both *Boucher et al. v. Public Accountants Council for the Province of Ontario,* 2004 CanLII 14579 (ON CA), [2004] O.J. No. 2634 (Ont. C.A.), and *Delellis v Delellis and Delellis,* 2005 CanLII 36447 (ON SC), [2005] O.J. No. 4345. Both these cases point out that when assessing costs it is "not simply a mechanical exercise." In *Delellis,* Aston J. wrote at paragraph 9:

> "... recent cases under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended have begun to de-emphasize the traditional reliance upon "hours spent times hourly rates" when fixing costs....Costs must be proportional to the amount in issue and the outcome. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant."

[10] Paragraph 26.

(f) Other relevant factors

65. Finally, the court has considered the respective financial positions of the parties [*MacDonald v. Magel* 2003 CanLII 18880 (ON CA).]. Mr. Foley has a net worth in excess of $2,000,000.00 according to his sworn financial statement.[11] Ms. Watkins earned $3,160.00 in 2016. She shows $47,544.00 as her current annual income, comprised of spousal support and child tax benefits[12]. I am satisfied that Mr. Foley can meet any costs obligation.

66. In my general assessment of the overall comparability of the Offers to Settle as contrasted with the final order, I find that Ms. Watkins was the successful party. I have found that Ms. Watkins behaved reasonably under the circumstances and that the cost claimed is proportionate to the issues. I do not find that Ms. Watkins promoted unnecessary or excessive litigation. She is therefore entitled to costs. The divided success of the parties on the issue of child support and s. 7 expenses has been factored into costs calculations, as has the fact that it is alleged that Ms. Watkins failed to provide the full disclosure application particulars from High Meadow.

67. Ultimately costs are in the discretion of the court. Considering all the circumstances in this case, my view is that it is appropriate for the court to exercise its discretion in ordering that costs be payable by Mr. Foley to Ms. Watkins. Given the law and in particular Rules 18 and 24, I find that Ms. Watkins is entitled to costs on a substantial indemnity scale.

6: ORDER

68. In summary, I order as follows:

1. Michael Foley shall pay to Mari-Claire Watkins her costs of the motion to change on a substantial indemnity basis in the amount of $5598.58 for all fees, disbursements, and H.S.T. All costs are to be paid within 30 days.

Released: January 30, 2018

Signed: Justice Jane Caspers

[11] Volume 4, tab 17.
[12] Volume 2, tab 9.