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ORKIN ON THE LAW OF COSTS

Mark M. Orkin
Robert G. Schipper
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This is a unique looseleaf service that covers all costs issues in legal proceedings, with relevant decisions analyzed and rules of court and tariffs referenced for every jurisdiction. This practical all-in-one resource provides coverage of the awarding and fixing or assessment of costs between party-and-party and between solicitor-and-client; costs in both civil and criminal proceedings; and costs awards in bankruptcy and insolvency proceedings and construction liens.

What's New in this Update

This release includes updates to Chapter 3. Solicitor-and-Client Costs, Chapter 4. Costs of Motions, Chapter 5. Security for Costs, Chapter 8 Appeals, Chapter 11. Costs in the Federal Court and Chapter 14. Costs in the Family Court and the Small Claims Court.

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Highlights

- **Party-and-Party Costs—Several Plaintiffs—§ 2:76. Person not a Party—Costs Against a Non-Party—**In this decision from the Ontario Court of Appeal, the issue before the court was whether the plaintiff's lenders were liable to pay costs to the defendants for an unsuccessful litigation financed by their loans. The trial judge in this case found that none of the lenders instigated the litigation, were granted any share of its proceeds, nor given any control or direction over its conduct or settlement. On the basis that the issue of whether the lenders should be responsible for the costs was novel, the trial judge did not award costs of the motion. The Court of Appeal denied leave to appeal on that issue. The mere fact that a loan's principal is used to fund unsuccessful litigation should not render the lender liable for the cost of that litigation absent evidence that the lender exercised control over the conduct of the litigation and did so in a way that constituted an abuse of process. To hold otherwise would expand the category of cases in which a non-party would be liable for costs in unpredictable ways. Even though the loans preceded the enactment of s. 33.1 of the CPA which now governs court approval of third-party funding agreements for class proceedings, the trial judge was of the view that the class member, or his counsel, was required to obtain approval under the common law. The discretion to order costs against a non-party based on inherent jurisdiction exists to achieve a narrow but important goal-to visit the cost of a proceeding on a person who instigates or conducts litigation in a manner that abuses the Court's process. The discretion to order non-party costs does not exist to regulate all practices or to respond to all concerns around litigation lending, where the lender does not instigate or assert a significant degree of control over the litigation in a manner that abuses the Court's process: *Davies v. Clarington (Municipality)*, 2023 ONCA 376 (Ont. C.A.).
- **Security for Costs—Jurisdiction—§ 5:1. Introduction—**In this decision from the Court of Appeal for British Columbia, the respondents applied for an order requiring the appellant to post security for costs of the appeal and costs in the trial court based on the standard scale. The respondents argued that, under the new *Court of Appeal Act* (B.C.) the criteria for ordering security for both types of costs were the same. The Court of Appeal held that the application be granted. On the application for security for costs of the appeal, the appellant's failure to provide financial information, slim potential for success on appeal, and the respondents' timely application weighed in favour of the application. On

the application for security for costs in the trial court, prejudice was no longer a component of the jurisdictional foundation for ordering security for trial costs, under the new Act. Prejudice remains an important consideration to the exercise of discretion given to a justice by s. 34(1)(b) of the new Act. The exercise of judicial discretion on applications before a single justice always engages the interests of justice. While the articulation of prejudice varies from one sort of application to another, the exercise of discretion always requires a justice to consider the consequential harms and benefits of making or refusing an order. The merits of the appeal and the effect of the order on the ability of the appellant to carry on with the appeal remain relevant. The question of the onus is for the applicant to establish that the order should be made. The countervailing feature on an application for security for costs of the appeal that supports shifting the onus onto the appellant-namely that the application's purpose is to provide security for further expenditures of the respondent, who was successful at trial-does not pertain in the case of securing costs already incurred at the trial level: *England Securities Ltd. v. Ulmer*, 2023 BCCA 11 (B.C. C.A.).

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