**Costs Awards in Class Actions - General Principles and Recent Trends**

**Cheryl Woodin and Jessica Starck, Bennett Jones LLP**

The lens through which costs awards in class actions have been determined over the last year includes an increasing focus on the appropriateness of the scope of the contested event. The reasonableness of costs awards in class actions are also increasingly being determined from the objective standpoint of the court, rather than the subjective standpoint of the losing party. Although the general rule that costs should follow the event continues to apply in class actions,[[1]](#footnote-2) courts are regulating the strategic choices of the parties through the costs award. In a fashion, courts are demonstrating a desire to define the “event” from which costs should reasonably follow.

At the most basic level, costs awards function to fulfill two goals – deter meritless claims and facilitate access to justice for those who seek to vindicate a legally sound position.[[2]](#footnote-3) Class proceedings are similarly held out as a procedural vehicle providing greater access to justice to individuals with meritorious claims, who might otherwise be deterred from bringing an individual claim on account of economic, social, and psychological barriers.[[3]](#footnote-4) Despite their similar objectives, reconciling costs awards within the context of class actions has proven difficult, and there currently exists great variability between costs awards. Recent case law suggests that this variability arises in part from the difficulty in assessing the overarching “reasonableness” of a costs award in the context of a class action and a general sentiment that what counsel deem to be “reasonable” costs in the context of a class action has itself become unreasonable.

This paper considers the various factors courts take into account when determining whether or not a costs award is reasonable. We begin by looking at the concept of reasonableness itself, exploring the recent frustration expressed by judges with respect to “run-away” costs. Next, we review the various factors at play in a court’s overall assessment of reasonableness. These factors include: tactical decisions by counsel, ultimate success, the representative plaintiff’s ability to pay costs, and the presence of public interest and novel issues. Finally, we consider when, if ever, it is appropriate to order advance costs. This paper primarily considers these issues as they have arisen in Ontario courts, however, reference and comparison to other Canadian provinces is also explored.

**Determining Reasonableness**

The guiding principle in determining costs is reasonableness. It has long been held that the costs awarded must reflect the “fair and reasonable” expectations of the unsuccessful litigant.[[4]](#footnote-5) However, assessing reasonableness from the perspective of the litigants has recently been criticized in Ontario by Justice Perell as fostering “out of control” costs in class proceedings. In *Heller v. Uber*,[[5]](#footnote-6) Justice Perell explained that “the subjective reasonable expectations of the losing party in a class action are no longer reasonable” and that “both sides over-litigate, knowing that over-litigating is what their foe will also be doing and knowing that the court will not second-guess the lawyer’s decisions”.[[6]](#footnote-7) In these circumstances, Justice Perell admonished courts for failing to rein in the parties’ unreasonable expectations and encouraged judges to second-guess what is actually reasonable, from an objective standpoint.[[7]](#footnote-8) The defendants in *Uber* were successful on a stay motion and sought indemnification of $158,000, all inclusive. Justice Perell concluded that $65,000 was appropriate. In *Paniccia v. MDC Partners Inc*.,[[8]](#footnote-9) which was released on the same day as *Uber*, Justice Perell again emphasized the need for an objective assessment of reasonableness. The plaintiff in *Paniccia* sought costs of $158,113.56 all-inclusive, on two motions in which the defendants sought an order restricting the defined class. Justice Perell concluded that the plaintiff’s claim was excessive and beyond the reasonable expectations of the unsuccessful party, ultimately awarding $64,279.31 in costs, all-inclusive. In reaching this conclusion, Justice Perell relied on his decision in *Uber* and again stated that an objective assessment, having regard to the circumstances of the particular case is necessary. He further warned that “run-away costs are a threat to access to justice for both plaintiffs and defendants”.[[9]](#footnote-10)

Justice Perell had previously raised similar concerns in *Yip*, warning “a class proceeding should not become a means for either defendants or plaintiffs to overspend on legal expenses simply because the economies of scale of a class proceeding makes it worthwhile to enlarge the investment in the defence or prosecution of the case”.[[10]](#footnote-11)

In light of this push towards a more objective assessment of reasonableness, both class counsel and defence counsel should be alert to the potential risk of increased judicial scrutiny of incurred costs. The best way for counsel to accurately predict what a court will determine to be reasonable is by giving due consideration to the various factors that courts generally take into account when making costs awards.

**Factors to be Considered When Assessing Reasonableness**

The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case. In Ontario, section 31(1) of the *Class Proceedings Act*, 1992 gives the court additional discretion in deciding whether or not to award costs where the action was a test case, raised novel points of law, or involved matters of public interest.[[11]](#footnote-12) These factors, along with other considerations that have repeatedly been noted as being relevant to a court’s discretionary assessment of costs are discussed below.

1. ***Tactical Decisions of Counsel***

Failing to concede an issue when it would have been reasonable to do so may result in increased costs. In Ontario, the basis for increasing costs in these circumstances comes from Rule 57.01,[[12]](#footnote-13) which provides guidelines for the court’s discretion over costs and directs courts to take into consideration the “conduct of any party that tended to lengthen unnecessarily the duration of the proceedings” or a “denial or refusal to admit anything that should have been admitted”. For example, in *Bernstein v. Peoples Trust Co*.,[[13]](#footnote-14) Justice Perell noted that the applicability of a limitation period, which ultimately resulted in a significant narrowing of the class period, was an issue that should have been conceded by class counsel. Justice Perell stated that class counsel should not over-plead their case and should make appropriate admissions or concessions. Over-pleading can render a certification motion hotly contested and expensive, which simply aggravates the access to justice problems that class actions should theoretically ameliorate.[[14]](#footnote-15) Justice Perell also cautioned class counsel against over-pleading a case in order to finance the class action and noted that the modern day landscape, where certification is the norm, should discourage class counsel from feeling the need to “plead everything in the hope that something will be certifiable”.[[15]](#footnote-16) Despite noting that the refusal to admit or lengthening of the case was “quite modest” in *Bernstein*, Justice Perell nevertheless seized the opportunity to send a “salutary message” to class counsel “that they should not over-plead their case and that they should make appropriate admissions or concessions”.[[16]](#footnote-17)

In *Berg v. Canadian Hockey League*,[[17]](#footnote-18) both the plaintiffs and the defendants were rebuked by Justice Perell for over-pleading, but the defendants nevertheless bore the brunt of a large costs award resulting from that “over-pleading”. The plaintiffs claimed that Canadian and American hockey teams in both the Ontario Hockey League and the Canadian Hockey League were not paying players minimum wage and overtime as required under the employment standards statutes. The plaintiffs also advanced claims of (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy (5) unjust enrichment, and (6) waiver of tort. The plaintiffs were successful in certifying the claims for breach of employment law statutes and unjust enrichment against the Canadian teams only. In determining costs, Justice Perell concluded that “both parties are equally responsible for transforming the certification motion from a procedural motion into a substantive motion where both parties attempted to justify both their legal and their moral positions.”[[18]](#footnote-19) In his opinion, the plaintiffs baited the defendants by over-pleading their case, provoking the defendants to prove the merits of their case on the certification motion. In this sense, “both parties took the certification motion into territory that was outside the boundaries of a certification motion”.[[19]](#footnote-20) Justice Perell awarded the plaintiffs costs as claimed, amounting to $1,212,065.63, all inclusive, $500,000 payable forthwith with the balance of $712,065.63 payable in the cause. The American teams were awarded $200,000, which was credited against the award made against the commonly represented defendants. *Berg* therefore serves as an important reminder to defendants of the risks associated with pleading the merits of their defence in the context of a certification hearing, regardless of whether they are being “baited” into doing so by the plaintiffs’ own over-pleading.

In *Kalra v. Mercedes*,[[20]](#footnote-21) the plaintiff’s costs award was reduced as a result of its tactical decision to devote a significant portion of the certification motion to issues of aggregate damages and class-wide loss – a decision that Justice Belobaba concluded amounted to a “waste of time and effort for which the defendant should not be required to pay.”[[21]](#footnote-22) Justice Belobaba reduced the plaintiff’s costs award by subtracting the fees and other costs associated with making submissions on these issues and then further reduced the costs award by 20% in order to reflect what he believed to be the overall significance of these issues on the certification motion.[[22]](#footnote-23) In doing so, Justice Belobaba acknowledged that in deciding costs on a certification motion, it is not proper for a judge to break the certification motion down with a play-by-play analysis, nevertheless, a fair and reasonable assessment of costs should take into account misguided and time consuming strategic choices by class counsel leading to increased costs.[[23]](#footnote-24)

1. ***Success on Motion***

In *Good v. Toronto Police Services Board*, the Ontario Court of Appeal considered and dismissed the argument that a plaintiff’s costs award should be reduced based on the plaintiff’s lack of success in certifying certain issues.[[24]](#footnote-25)Subsequently, in determining the proper amount of costs to be awarded to the plaintiff in *Heyde v. Theberge*,[[25]](#footnote-26) in which the defendant was successful in reducing some of the issues that were certified, Justice Smith relied on the Court of Appeal’s decision in *Good* and concluded that the defendant’s partial success was not a valid reason to reduce the plaintiff’s costs award or to award costs to the defendant for his success on this issue. The reluctance to reduce costs awards to reflect the partial success of one of the parties was also recently discussed by Justice Perell in *Bennett v. Lenovo(Canada) Inc*.:

It is not uncommon in class actions, as was the situation in the immediate case, that the unsuccessful party enjoys a measure of success because it has reduced the class size or prevented the class from expanding or because it has had an influence in shaping the common issues or the litigation plan, but this measure of success does not necessarily mean that the court should reflect the unsuccessful party’s measure of success by diminishing what in every other respect is a fair claim for costs by the successful party.[[26]](#footnote-27)

In other words, class actions are not conducive to a detailed dissection of “success” because the ultimate result will often be some form of compromise.

In *Fehr v. Sun Life Assurance Company*,[[27]](#footnote-28) Justice Perell addressed the difficulty of determining ultimate success in the context of combined motions. In *Fehr*, the plaintiffs brought a certification motion and the defendant brought a cross-motion for summary judgment. The defendant lost the summary judgment motion, but in doing so, it became clear that there was no utility in certifying the class action, as it was “woefully deficient”.[[28]](#footnote-29) The defendants claimed $2.5 million in costs on a partial indemnity basis. Justice Perell concluded that although the defendants failed in their mission to have the action dismissed, they nevertheless “achieved a tactical and strategic victory for the certification motion” and awarded the defendants $1.0 million in costs, all inclusive.[[29]](#footnote-30)

1. ***Representative Plaintiff’s Ability to Pay Costs***

The financial ability of the representative plaintiff to bear the expenses associated with prosecuting a class action is a relevant consideration in determining whether he or she is properly qualified to act as a representative plaintiff.[[30]](#footnote-31) The representative plaintiff’s ability to pay an adverse costs award has been considered within this context. Although in practice it is common for class counsel to agree to indemnify representative plaintiffs for any adverse costs awards, there is nothing in the *CPA* that requires them to do so. Representative plaintiffs’ exposure to costs may also be assumed by the Law Foundation of Ontario (the “**Law Foundation**”) pursuant to the *Law Society Amendment Act (Class Proceedings Funding)*, 1992, S.O. 1992, c.7. However, such funding is contingent on a successful application to the Class Proceedings Committee of the Law Foundation and by no means guaranteed. Therefore, in theory, a representative plaintiff may be liable to pay any adverse costs award resulting from the proceedings. Recently, in *Sondhi v. Deloitte*,[[31]](#footnote-32) Justice Perell considered this issue in the context of assessing whether the representative plaintiff had adequately demonstrated his financial capability to prosecute the class action. A plaintiff’s want of financial resources is just one factor, and not a determinative one, in considering whether a plaintiff qualifies to be a representative plaintiff. In the class actions context, examining the plaintiff’s financial capacity to pay costs is more about protecting the class members’ interests in access to justice than about ensuring that plaintiff is able to pay the defendant’s costs. Considering these factors, Justice Perell held that there were no grounds to disqualify the representative plaintiff in *Sondhi* based on any want of financial resources to adequately prosecute the class action[[32]](#footnote-33).

1. ***Public Interest & Novel Issues***

To be a matter of “public interest”, the action must have some specific, special significance for, or interest to, the community at large beyond the interests of the parties to the litigation. A public interest litigant is usually a litigant that advocates a matter of public importance but with little or nothing personally to gain financially from participating in the litigation. However, that a proposed representative plaintiff brings an action out of a *bona fide* concern to vindicate his or her concern for the public interest does not necessarily insulate that person from an award of costs. It is also not enough for the issues to be of great significance to the proposed class – the public interest threshold requires that the class action “have some specific, special significance for, or interest to, the community at large beyond the members of the proposed class”.[[33]](#footnote-34)

Justice Perell recently discussed what is required for an action to be considered within the “public interest” in *Das v. George Weston Limited*.[[34]](#footnote-35) The proposed class action involved a $2 billion claim brought by the plaintiffs against Canadian retailer Loblaw Inc. and three affiliates, which had indirectly sourced clothing through factories in Rana Plaza, and French testing, inspection, and certification company Bureau Veritas SA and two affiliates, which had been engaged to perform two limited social audits of a factory in Rana Plaza. The proposed class action was brought on behalf of Bangladeshis injured in the collapse of the Rana Plaza building in Dhaka in 2013 and their families. 2520 were injured and 1130 died in the collapse. Justice Perell dismissed the certification motion and the action outright.[[35]](#footnote-36) He found the alleged duties of care do not exist under Bangladesh law, which he concluded governed the action under Ontario’s choice of law rules, or even under Ontario law.

The plaintiffs in *Weston* had received funding from the Law Foundation. On the issue of costs, the Law Foundation argued that the defendants should bear their own costs of the proceeding, or at a minimum, that costs be substantially reduced to reflect the significant public interest in and novelty of the case. Justice Perell disagreed. He found that the plaintiffs were significantly motivated by money, independent of public policy and that the plaintiffs were intent on pressuring the defendants to settle and pay a substantial award. The proposed class action was not purely altruistic and the risks of a costs award must have been weighed by class counsel when they litigated the case with little or no mercy, temperance or proportionality. Furthermore, the plaintiffs pleaded and prosecuted their case in a way that indicated they expected to be paid costs.[[36]](#footnote-37) Finally, the plaintiffs went out of their way to vilify the defendants and presented the case as if the defendants intentionally injured those at the Rana Plaza. Justice Perell ultimately awarded unreduced costs of $1,350,000 to the Loblaws Defendants and $985,601.60 to the Bureau Veritas Defendants, “for the aggressively prosecuted and aggressively defended motions that were dispositive of a $2 billion proposed class action”. Justice Perell’s decision on costs is currently on appeal before the Court of Appeal for Ontario.

Justice Perell also dismissed the public interest and novelty argument in *Berg*. Although stating that he was not expressing any opinion on whether novel issues were at play or whether the class action and the defence constituted public interest litigation in the “requisite” sense, Justice Perell nevertheless expressed dismay over the parties’ suggestion that these concepts were applicable. In his view, the action was clearly motivated by money:

The Plaintiffs did not bring the litigation because they thought they had an innovative interpretation of the employment legislation; they sued because they thought the Defendants were breaching the statutes and they wanted to be paid for their overtime work.[[37]](#footnote-38)

Thus, Justice Perell concluded that it was somewhat disingenuous for the parties to suggest that this litigation amounted to anything other than self-interested commercial litigation.[[38]](#footnote-39)

Justice Perell recently had occasion to again consider the applicability of public interest and novelty of the issues being determined in *Mancinelli v. Royal Bank of Canada*,[[39]](#footnote-40) and again concluded that these concepts did not apply in the circumstances of the action before him. The costs decision in *Mancinelli* arose in the context of a class action alleging a price-fixing conspiracy involving 16 groups of financial institutions. The plaintiffs’ brought a motion seeking to add two additional financial institutions as defendants. Justice Perell dismissed their motion.

With respect to costs on the motion, the plaintiffs argued there should be no award as to costs as the issue was novel. Justice Perell disagreed, on the basis that a novel issue does not simply mean that the issue is unprecedented or the issue has not been decided before. A legally significant novelty arises if the existing case law is inadequate to resolve the issue and there would be no proper reason for the party advancing the issue to expect to fail. Simply stating there is no decided case law directly on point raises the objection that although there is no direct case law, the existing case law is clearly against the position of either party. Therefore, the litigant should reasonably expect to lose and thus, the case is not novel in the sense required to displace a costs award.

In *Mancinelli*, Justice Perell ultimately concluded that there was adequate case law to decide the contested issue. The plaintiffs’ arguments and issues were not venturing into uncharted legal territory. Therefore, there was no novelty in the issue that warranted deviation from the normal order as to costs.

The basic principle arising out of these three recent decisions is that courts will be weary of litigants who appear to be hiding behind assertions of public interest and novelty of the action as a means of avoiding liability for costs. The factors supporting such a claim either exist or they do not. As Justice Perell explained in *Weston*:

An after-the-fact submission that the case was novel or in the public interest has to be taken with more than a grain of salt. There is some irony when an unsuccessful party introduces a novel point and then relies on it to avoid paying costs when it is doubtful that had they been successful, they would have agreed to forgo costs.[[40]](#footnote-41)

The threshold for novel or public interest claims is clearly very high. However, it is not necessarily completely unattainable. As will be considered below, a recent case from the Court of Appeal of Alberta discusses public interest in the context of awarding advance costs. This case provides some guidance in terms of understanding exactly how high the public interest threshold is in the context of recent class action litigation.

**Advance Costs**

Advance costs awards run contrary to the basic principle that costs should follow the event by allowing for a party to obtain costs prior to a determination of the outcome of a particular step in the proceeding. As such, advance costs awards are extremely rare. In exceptional circumstances however, the court does have jurisdiction to make such an award. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, the Supreme Court of Canada set out a three-part test for awarding advance costs:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made;
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.[[41]](#footnote-42)

The Supreme Court noted that all three factors are necessary conditions for an advance costs award. However, even when these conditions are met, the court retains discretion over whether such an award should be made in the circumstances. In exercising its discretion, a court should carefully fashion the orders over the course of the proceedings to ensure that concerns about access to justice and efficient conduct of litigation are balanced. An award of advance costs should not impose an unfair burden on the defendants. The court must use its discretion to determine whether the case is such that the interests of the defendants would be best served by making the order.

Justice Perell has described the jurisdiction to award advance costs as an “extra-extra extraordinary” jurisdiction.[[42]](#footnote-43) In *Little Sisters*, the Supreme Court of Canada clarified that the court’s discretion to award advance costs according to the test laid out in *Okanagan* applies only to those few situations where a court would be participating in an injustice against the litigant personally and against the public generally if it did not order advance costs to allow the litigant to proceed.[[43]](#footnote-44)

The Court of Appeal of Alberta recently applied these factors and ultimately awarded advance costs to EMP and LC, the representative plaintiffs in a class action against the province of Alberta. The action alleged that the province held numerous children in its custody without lawful authority. EMP represented a class of children who were held in the custody of the province without lawful authority and LC represented a class of family members of those children. The class action was successfully certified and the case management judge (“**CMJ**”) awarded EMP advance costs to continue with the class proceedings. Alberta appealed both the certification decision and the advance costs decision. EMP sought advance costs to respond to Alberta’s appeal of the advance costs decision as well as to respond to the certification appeal. LC also sought advance costs to respond to the certification appeal.

The CMJ concluded and the Court of Appeal agreed that the plaintiffs were clearly impecunious, thus satisfying the first element of the three-part test set out in *Okanagan*. Class counsel indicated that they would cease to act if advance costs were not awarded and although they had reached out to numerous private funding groups and not-for-profit organizations, no additional funding had been secured.

With respect to the second factor, the class action was considered *prima facie* meritorious, given that it had been certified. Lastly, the action was in the public interest, particularly for the class of people involved, and the issues raised had not been decided in previous cases. On this issue, the Court of Appeal explained, “this case is one of a kind, given the nature of the allegations including that some of society’s most vulnerable citizens were held without lawful authority”.[[44]](#footnote-45)

In Ontario, Justice Perell awarded advance costs to an individual, Ruth Ann Henry, in the context of the administration of the Indian Residential Schools Settlement Agreement (“**IRSSA**”).[[45]](#footnote-46) The IRSSA is a contract that settled numerous class actions and individual lawsuits against Canada relating to its Indian Residential School policy. In order for an individual to be eligible for compensation under the IRSSA, the institution they attended must first be identified as an Indian Residential School (“**IRS**”). In the context of seeking to have the institution she attended identified as an IRS, Mrs. Henry brought a motion for advance costs. Although Justice Perell awarded Mrs. Henry advance costs, he made it abundantly clear that such awards are exceedingly rare, in part because of the difficulty associated with establishing the public interest element of the three-part test set out in *Okanagan*:

Showing some merit to the litigation and showing impecuniosity are the least extraordinary factors of an advance costs award, and the most rigorous and the most important criterion for an advance costs award is that of showing that the issues transcend the individual interests of the particular litigant and are of public importance and have not been resolved in previous cases.[[46]](#footnote-47)

Justice Perell described Mrs. Henry’s case as “an aspect of what is undoubtedly the most extraordinary of class actions”.[[47]](#footnote-48) He concluded that it is in the public interest that Mrs. Henry gain access to the justice system and get her day in court. Finally, Justice Perell noted that the defendant in this case is the “supreme public authority”, thus appeasing any concerns over the impact of an advance costs award against private litigant defendants.[[48]](#footnote-49)

**Conclusion**

Recent costs decisions in the context of class actions suggest increasing concern and frustration over rising costs reported by both defence and class counsel. There appears to be a push, at least in Ontario, for judges to start making objective assessments of reasonableness, rather than taking the parties’ perspective on reasonable costs at face value. Courts continue to take into account a variety of factors when making their discretionary assessment of reasonable costs awards. Recent decisions also reflect a high degree of skepticism over parties’ frequent assertions that claims are being brought in the public interest and thus merit a reduced costs award. Such assertions will be carefully scrutinized and the high threshold for successfully establishing public interest and novelty of a claim is becoming increasingly clear.

1. The provinces of British Columbia and Manitoba have legislated “no costs” regimes in the context of class actions. Although Saskatchewan was also previously a “no costs” jurisdiction, the province amended it *Class Actions Act*, SS 2001, c C-12.01 in May 2015 to make Saskatchewan a “costs” jurisdiction. [↑](#footnote-ref-2)
2. *British Columbia (Minister of Forests) v. Okanagan Indian*, 2003 SCC 71at para. 26 [***Okanagan***]. [↑](#footnote-ref-3)
3. Michael A. Eizenga et al, *Class Actions Law and Practice*, loose-leaf consulted on April 12, 2018), (Toronto: LexisNexis, 2009), ch 1 at 1-3. [↑](#footnote-ref-4)
4. *Yip v. HSBC Holding*, 2017 ONSC 6848 at para 30 [***Yip***]. [↑](#footnote-ref-5)
5. 2018 ONSC 1690 [***Uber***]. [↑](#footnote-ref-6)
6. *Ibid* at para. 17. [↑](#footnote-ref-7)
7. *Ibid* at paras. 3 and 17. [↑](#footnote-ref-8)
8. 2018 ONSC 1775 [***Paniccia***]. [↑](#footnote-ref-9)
9. *Ibid* at para. 9. [↑](#footnote-ref-10)
10. *Yip*, *supra* note 4at para. 44. [↑](#footnote-ref-11)
11. *Class Proceedings Act*, 1992, S.O. 1992. C.6, s.31(1) [***CPA***]. [↑](#footnote-ref-12)
12. *Rules of Civil Procedure*, RRO 1990, Reg 194. [↑](#footnote-ref-13)
13. 2017 ONSC 2189 [***Bernstein***]. [↑](#footnote-ref-14)
14. *Ibid* at para. 12. [↑](#footnote-ref-15)
15. *Ibid* at para. 13. [↑](#footnote-ref-16)
16. *Ibid* at para. 11. [↑](#footnote-ref-17)
17. 2017 ONSC 5382 [***Berg***]. [↑](#footnote-ref-18)
18. *Ibid* at para. 56. [↑](#footnote-ref-19)
19. *Ibid* at para. 50. [↑](#footnote-ref-20)
20. 2017 ONSC 4692 [***Kalra***]. [↑](#footnote-ref-21)
21. *Ibid* at para. 10. [↑](#footnote-ref-22)
22. *Ibid* at para. 13. [↑](#footnote-ref-23)
23. *Ibid* at para. 13. [↑](#footnote-ref-24)
24. 2016 ONCA 250 [***Good***]. [↑](#footnote-ref-25)
25. *Heyde v. Theberge Developments Limited,* 2017 ONSC 3462 [***Heyde***]. [↑](#footnote-ref-26)
26. *Bennett v. Lenovo (Canada) Inc*., 2017 ONSC 6839 at para. 6 [***Bennett***]. [↑](#footnote-ref-27)
27. 2017 ONSC 2218. [↑](#footnote-ref-28)
28. *Ibid* at para. 3. [↑](#footnote-ref-29)
29. *Ibid* at para 67. [↑](#footnote-ref-30)
30. *Sondhi v. Deloitte*, 2018 ONSC 271 at para. 46 [***Sondhi***]. [↑](#footnote-ref-31)
31. *Ibid.* [↑](#footnote-ref-32)
32. *Ibid* at paras. 69-70. [↑](#footnote-ref-33)
33. *Schneider v. McMillan LLP*, 2017 SKQB 222 at para. 15, citing *McCracken v. Canadian National Railway*, 2012 ONSC 6838 at para. 79. [↑](#footnote-ref-34)
34. 2017 ONSC 5583 [***Weston***]. [↑](#footnote-ref-35)
35. *Das v. George Weston Limited*, 2017 ONSC 4129. [↑](#footnote-ref-36)
36. *Weston*, *supra* note 34 at para. 124. [↑](#footnote-ref-37)
37. *Berg*, *supra* note 17 at para. 41. [↑](#footnote-ref-38)
38. *Ibid* at para. 39. [↑](#footnote-ref-39)
39. 2018 ONSC 797 [***Mancinelli***]. [↑](#footnote-ref-40)
40. *Weston*, *supra* note 34 at para. 93. [↑](#footnote-ref-41)
41. *Okanagan*, *supra* note 2. [↑](#footnote-ref-42)
42. *Fontaine v. Canada (Attorney General)*, 2015 ONSC 7007,at para. 62 [***Fontaine***]. [↑](#footnote-ref-43)
43. *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2at para. 5 [***Little Sisters***]. [↑](#footnote-ref-44)
44. *LC v Alberta*, 2017 ABCA 133 at para. 30. [↑](#footnote-ref-45)
45. *Fontaine*, *supra* note 42. [↑](#footnote-ref-46)
46. *Ibid* at para. 90. [↑](#footnote-ref-47)
47. *Ibid* at para. 93. [↑](#footnote-ref-48)
48. *Ibid* at para. 97. [↑](#footnote-ref-49)