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## Can a “Non-Party” Director of a Corporation be held Personally Liable for litigation costs?



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Where a corporation is a party to litigation, Courts will very rarely award the costs of the action against the non-party directors, shareholders or principals of the company. A recent decision of the Ontario Court of Appeal, *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, however, expands the circumstances in which a non-party may be held personally liable for litigation costs. In *Laval*, the Court affirmed its inherent jurisdiction to award costs against a non-party who commits an abuse of process.

**Facts**

*Laval* involved two actions by the plaintiff corporation against the defendant Laval Tool & Mould Ltd. (“LTM”). LTM was a family business. The principal and shareholder of the plaintiff corporation, Emmanuel, sought damages for alleged tax consulting services performed by him for LTM.

In the first action, the plaintiff corporation was the sole plaintiff. It sought damages against LTM for breach of contract and unjust enrichment allegedly arising out of

the tax services Emmanuel provided. Emmanuel then commenced a second action against LTM, in which both he and the plaintiff corporation were plaintiffs. The second action alleged the same causes of action as the first. The two actions were tried together.

Ultimately, the trial judge dismissed both of the plaintiffs’ actions. Following trial, he asked the parties to make costs submissions, asking them to address LTM’s request that the costs of the first action, in which only the plaintiff corporation was a party, should be awarded against Emmanuel personally.

Following an analysis of the law governing non-party costs, which will be discussed below, the trial judge held that the plaintiff corporation was not put forward by Emmanuel as a “man of straw” to shield Emmanuel from the costs of the first action. That is, Emmanuel did not cause the plaintiff corporation to start the action so that he could avoid any personal liability for costs.

Accordingly, as the “man of straw” was the only applicable circumstance

in the case law in which a non-party director could be held liable for costs, costs could not be awarded against Emmanuel personally in the first action.

The Court of Appeal reversed the trial judge's decision. It held that in addition to the "man of straw" exception, the Court had an inherent jurisdiction to award costs against a non-party who committed an abuse of process.

In this case, Emmanuel put forward the plaintiff corporation in the first action on a "mistaken view that he could assert his personal claim against LTM through his corporation".

Although his motive for putting the plaintiff corporation forward was not to shield himself personally from a costs award, Emmanuel nonetheless engaged in an abuse of the Court's process. He caused the plaintiff corporation to "issue an invoice for tax services allegedly performed for LTM for the purpose of securing a tax advantage".

The first action was "fictitious, as there was no evidence that [Emmanuel] or [the plaintiff corporation] ever performed tax services for LTM". Emmanuel had no good reason for bringing his action in the corporation's name, rather than in his own. The "effect was that LTM had to defend two equally fruitless proceedings and incur the costs of each by retaining separate counsel". The litigation amounted to a waste of public and judicial resources. As Emmanuel's

conduct constituted an abuse of process, costs could be awarded against him personally as a non-party to the litigation.

### The Law Before *Laval*

In order for the Court of Appeal to decide whether it had inherent jurisdiction to award non-party costs, it had to come to terms with two of its previous decisions, *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.* (1972), 3 O.R. 199 (C.A.) and *Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.* (1997) 34 (3d) 291.

In *Rockwell* and *Television Real Estate*, the Court of Appeal held that the Court had statutory jurisdiction under section 131 of the *Courts of Justice Act* to order non-party costs only if the non-party put forward a "man of straw" corporation to shield itself from costs.

Section 131 of the *Courts of Justice Act* confers statutory jurisdiction on the Court to award costs as follows:

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 extend the costs shall be paid.

The Court in *Rockwell* held that the term "by whom" means "by which of the parties to the proceeding before the court or judge". In other words, section 131 does not confer jurisdiction on the Court to award

costs against anyone other than the parties to the litigation.

However, the Court in *Rockwell* and *Television Real Estate* recognized exceptions to this rule. Section 131 authorized costs awards against non-parties where the "man of straw" test was met. That is, if the non-party puts forward a corporate plaintiff as a "man of straw" to shield the non-party from a costs award, then the Court has the jurisdiction to award costs against the non-party under section 131. The rationale is that the non-party is in actuality the "party" driving the litigation. In such circumstances, section 131 authorizes costs against the person who is, in essence, the actual party advancing the litigation.

Apart from the "man of straw" exception, Ontario Courts also recognize their jurisdiction to award non-party costs under Rule 57.07 of the *Rules of Civil Procedure* against lawyers who engage in misconduct throughout the litigation.

Separate and apart from the "man of straw" and lawyer exceptions, however, the decisions in *Rockwell* and *Television Real Estate* precluded non-party costs awards under section 131 of the *Courts of Justice Act*.

### The Court's Inherent Jurisdiction to Prevent an Abuse of Process

Having considered the decisions in *Rockwell* and *Television Real Estate*, the Court of Appeal in *Laval* noted that these two decisions did not

preclude the Court from exercising its inherent jurisdiction to award non-party costs in order to prevent an abuse of process.

Superior Courts have an inherent jurisdiction to prevent an abuse of process. This means Courts have the power to prevent proceedings that are “unfair to the point that they are contrary to the interests of justice” or oppressive, frivolous and vexatious. Proceedings which undermine “the public interest in a fair and just trial process and the proper administration of justice” also amount to an abuse of process.

The Court’s inherent jurisdiction to prevent an abuse of process extends to awarding non-party costs on a discretionary basis. The Court gave examples of already-identified situations in the case law where a non-party could be held liable for costs for committing an abuse of process.

For example, a non-party who initiates proceedings using a nominal plaintiff “in order to oppress the defendant” could be engaging in an abuse of process.

Moreover, where a non-party puts forward a nominal plaintiff “to employ the court’s processes

as an instrument to defraud the defendant”, the Court could use its inherent jurisdiction to sanction such conduct through a non-party cost award. A non-party who engages in conduct that amounts to the tort of maintenance can also be said to have committed an abuse of process.

In short, the list of possibilities is not closed:

Situations of gross misconduct, vexatious conduct or conduct by a non-party that undermines the fair administration of justice other than those discussed can be envisioned.

The Court of Appeal therefore held that *Rockwell* and *Television Real Estate* did not preclude it from exercising its inherent jurisdiction. This jurisdiction exists in addition to the Court’s jurisdiction to award costs under section 131 of the *Courts of Justice Act* and Rule 57.07.

### **The Breadth of *Laval***

By recognizing the Court’s inherent jurisdiction to make non-party costs awards in cases of abuse of process, the Court in *Laval* has expanded the situations in which such awards can be made. While the overarching principle remains that non-party

costs awards are the exception, not the rule, *Laval* gives the Court the power to sanction directors or officers who advance litigation in the corporation’s name to thwart the administration of justice.

The harm *Laval* seeks to address is not so much the non-party’s efforts to drag the defendant through vexatious litigation, but what the non-party has done to undermine justice and the proper use of the Court system. The protection of limited Court resources from questionable litigation is now a legal basis for awarding non-party costs.