CITATION: Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology
COURT FILE NO.: CV-22-00675035
DATE: 20240515

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mariana Costa, Crystal Love, Alexandra Badowich and Angelina Mandekic, Applicants

AND: Seneca College of Applied Arts and Technology, Respondent

BEFORE: W.D. Black J.

COUNSEL: *Andre Memauri,* for the Applicants and Moving Parties

Howard Levitt, Kathryn Marshall and Alexis Lemajic, for the Respondent

HEARD: In-writing

ENDORSEMENT

Overview

[1] On September 12, 2022, I released a decision dismissing the applicants' motion for an injunction to prevent the respondent Seneca College of Applied Arts and Technology ("Seneca") from enforcing against them its policy requiring all students who attend Seneca's campus to be fully vaccinated for Covid 19.

[2] At the conclusion of that endorsement, regarding costs, I wrote, "I do not know if Seneca as the successful party, will be seeking its costs of the motion."

[3] I said that because the record and the submissions before me reflected that the two applicants bringing the motion, Ms. Costa and Ms. Love (the "Student Applicants) were each single mothers of limited means, subsisting in part on student loans.

[4] In seeking its costs, Seneca advised that it sought those costs against the non-party Justice Centre for Constitutional Freedoms ("JCCF"). Seneca asserted that the JCCF "brought this case", that it advertised the case extensively on its website, and that it fundraised to support the case. Counsel from the JCCF argued the injunction motion on behalf of the Student Applicants.

[5] By further endorsement dated November 24, 2022, I ordered JCCF to pay Seneca's costs, on a partial indemnity basis, in the amount of $110,000.00, plus disbursements in the amount of $46,461,99.

[6] By endorsement dated October 20, 2023, the Court of Appeal for Ontario allowed JCCF's appeal of my costs award and remitted the matter back to me, with guidance as to additional factors and considerations to be taken into account, to determine the issue of costs afresh.

[7] Accordingly, I convened a case conference with the parties, and provided direction concerning a schedule for the exchange of submission. I also provided direction, in line with the decision of the Court of Appeal, as to issues to be addressed within those submissions.

The Indemnity Agreement

[8] As an initial matter, again in accordance with the guidance from the Court of Appeal, I required JCCF and the Student Applicants to advise at the outset whether or not there was and is an arrangement in place whereby the JCCF agreed to indemnify the individual applicants for any costs award.

[9] Both JCCF and the Student Applicants confirmed, by the deadline set for them to do so, that there was in fact an indemnity agreement in place.

[10] The parties then exchanged submissions as directed.

Arguments Advanced by Seneca

[11] Seneca starts with the proposition that, as the successful party in the underlying litigation, it is entitled to its costs, and that there is no justification in this case for any different or "special cost treatment". It argues that, in particular, there is no justification for characterizing the individual applicants' application (for injunctive relief) as public interest litigation.

[12] Seneca argues that, given the role of the JCCF, which Seneca describes as "instigating this litigation and taking it well beyond the interests of the Student Applicants" a non-party cost award is merited. "However", Seneca says "given the indemnificatory relationship between the Student Applicants and the JCCF, it makes little difference who the costs order is against as the JCCF will be liable either way".

A. The Case Does Not Constitute Public Interest Litigation

[13] In its argument against construing this case as public interest litigation, Seneca first emphasizes, citing *Carter v. Canada (Attorney General)* 2015 SCC 5, that to be properly characterized in that way, "the case must involve matters of public interest that are truly exceptional". It is not enough, Seneca continues, "that the issues are novel and/or that they transcend the individual interests of the successful litigant – they must have a significant and widespread societal impact".

[14] In addition, Seneca maintains, the applicants must show that "they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds".

[15] Seneca points to Tranquilli J.'s reasons on costs in *Hawke et al v. The University of Western Ontario*, 2022 ONSC 7017, where the approach Seneca advocates was applied in very similar circumstances to those at hand.

[16] In *Hawke*, five students at the University of Western Ontario ("Western") sought to prevent Western from requiring proof of COVID-19 vaccinations from students for the 2022-2023 academic year. Justice Tranquilli denied the students' application and Western sought its costs on a partial indemnity scale.

[17] In responding to Western's position, the students asserted that their application constituted public interest litigation, such that no costs should be ordered.

[18] Her Honour did not accept this argument, and wrote:

> "…a deviation from the usual cost consequences for the purposes of public interest litigation should not become routine. The case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the litigant. They must also have a significant and widespread societal impact. The standard is a high one; only rare and exceptional cases will warrant such treatment. The Litigants must also have no personal, proprietary, or pecuniary inters in the litigation that would justify the proceedings on economic grounds."

[19] Seneca observes that in other cases, including the recent decision in *Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 4550, the following factors have been established as the relevant touchstones to assess whether or not litigation is public interest litigation:

(a) The nature of the unsuccessful litigant;

(b) The nature of the successful litigant;

(c) Whether the litigation itself was in the public interest; and,

(d) The financial consequences to the parties.

[20] Seneca submits, with respect to the first factor (and relative to Tranquilli J's observations in *Hawke*), that there can be no credible argument that the application was not motivated, at least in part, by personal and pecuniary interests of the Student Applicants. Seneca notes that the "crux" of the application "centered on their personal desire to continue their educations and careers in the industries of their choosing".

[21] As such, Seneca asserts, the relief sought by the Student Applicants was personal to them, and not to Seneca's population at large, let alone to society generally. In that vein, Seneca points out that numerous of the Student Applicants' arguments emphasized the impact of the Seneca policy, and the suggested benefit of injunctive relief, in particular on and to the Student Applicants.

[22] With respect to the second factor, the nature of the successful litigant, Seneca emphasizes that it is not a governmental organization, and that as a "private entity" it ought not to be deprived

of the costs to which it would ordinarily be entitled. Seneca acknowledges that it receives some amount of public funding, but points out that it relies heavily on collecting tuition payments and maintaining its profitability, making it more in the nature of a private entity than a public one.

[23] Turning to the third factor, Seneca argues that the nature of the injunctive relief sought by the Student Applicants does not translate to a widespread societal impact. It asserts that the relief sought did not even transcend the Student Applicants' individual interests, and that, at the time, there was nothing novel about challenges to COVID-19 policies and mandates. It points out that the underlying decision was one of many decisions in the school and employment contexts that addressed largely the same constitutional arguments canvassed in this case.

[24] On this same issue, Seneca argues that the involvement of a public interest litigant – as it acknowledges JCCF may be – does not transform the character of the litigation. The focus should remain on the Student Applicants' application for emergency injunctive relief, and whether that application was in the public interest.

B. The Impact of the Indemnity Agreement

[25] With respect to the cost consequences to the parties, Seneca submits that this analysis must now take into account JCCF's agreement, that has now emerged, to indemnify the Student Applicants.

[26] Having regard to that indemnity agreement, while Seneca maintains that it is entitled to costs directly from JCCF here, it also argues that it is entitled to costs regardless of whether the costs order is against the Student Applicants or against JCCF. Seneca says that its entitlement to costs, either way, is based on its success in defending the application.

C. Costs Against Non-Parties

[27] On the issue of a costs order against a non-party, the parties all make arguments arising from the Court of Appeal for Ontario's decision in *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, one of the cases highlighted in the Court of Appeal's decision in this case for consideration and submissions. In *Laval Tool*, the Court of Appeal confirmed the court's inherent jurisdiction, in controlling its own process, to make a costs order against a non-party who commits an abuse of process, and that the jurisdiction to do so was not limited to "persons of straw" scenarios. As discussed below, the Court of Appeal, in its decision in this case, expressed doubts about the JCCF's potential liability under either analysis ("persons of straw" or abuse of process).

[28] Referencing *Perez v. Galambos*, 2008 BCCA 382, Seneca asserts that "Courts in Canada have found non-parties liable for costs when the 'non-party's interests became the motivating force of the litigation, and the scope of the litigation was taken beyond the interest of the litigant'." Seneca likens this notion to what the Court of Appeal for Ontario discusses in paragraph 75 of *Laval Tool*, relative to the tort of maintenance, where the Court says "insofar as a non-party resembles a maintainer, thereby committing an abuse of process, a costs award against it may be warranted".

[29] Seneca asserts that "The political, ideological, and financial interests of the JCCF were undoubtedly the motivating force behind this litigation" noting that JCCF advertised this proceeding extensively on its website, thereby successfully raising substantial amounts to fund this litigation (as discussed in my original costs decision).

[30] Seneca argues that "It would certainly undermine the fair administration of justice to permit an organization to fundraise millions of dollars for litigation and insert itself into the core of the litigation, then try to shield itself from any payment of costs on the basis that it was acting in the 'public interest' and that the plaintiffs themselves were impecunious."

[31] This concern becomes all the more acute, Seneca asserts, in light of JCCF's conduct relative to the indemnity agreement under which it agreed to reimburse the Student Applicants for costs. That is, Seneca argues, "the JCCF was, at best, clandestine about the existence of the indemnity agreement both with the court and with Seneca". It observes that JCCF avoided the question about the existence of such agreement during the hearing at the Court of Appeal, and only divulged the existence of the indemnity agreement when I (prompted by the Court of Appeal's decision) ordered them to do so.

[32] Seneca submits that the concern about JCCF's non-disclosure is heightened because JCCF, in its submissions on costs, "was not shy about pointing to the impecuniosity of the Student Applicants as a reason why no costs should be ordered against them". Seneca argues that, given JCCF's knowledge of the indemnity agreement, these submissions were "incredibly misleading".

D. JCCF's Previous Non-Disclosure of Indemnity Agreement in *Servatius*

[33] Seneca asserts that the impecuniosity of the Student Applicants becomes irrelevant given the indemnification agreement. It points out that in *Servatius v. Alberni School District No. 70*, 2022 BCCA 421, the Court of Appeal for British Columbia "also dealt with a situation where the JCCF was not upfront about the indemnificatory relationship it had with the plaintiff, and [the court] only found out about it on appeal – precisely what happened in the present dispute."

[34] In *Servatius*, a public elementary school invited guests to demonstrate two Indigenous cultural practices: one was a smudging event held in a classroom and the other was a hoop dance during which the dancer said a prayer. The appellant mother of two students attending the school alleged that the school infringed her *Charter* guaranteed freedom of religion by compelling her children to participate in religious ceremonies contrary to their own faith and by violating the principle of state neutrality.

[35] The Court of Appeal for British Columbia upheld the trial judge's findings of fact and decision that the children were observing the events as educational experiences and not participating in them, such that their freedom of religion was not infringed.

[36] On the issue of costs, the B.C. Court of Appeal observed that Ms. Servatius had asserted that the litigation served the public interest, and that "her family was of 'limited means' and would 'suffer hardship' if costs were awarded against her (quotation marks in original). Ms. Servatius also argued that the School District had a 'superior capacity' to pay costs (quotation marks in original)". The B.C. Court of Appeal observed that the trial judge appeared to have accepted those submissions in ordering that each side bear its own costs.

[37] However, following the hearing of the appeal, it emerged that the JCCF was involved, a revelation described by the B.C. Court of Appeal as follows:

> "In her post-appeal written costs submissions, Ms. Servatius disclosed, for the first time, that the JCCF was funding her fees and disbursements in the litigation, as well as agreeing to help her pay any award of costs by agreeing to fundraise for her if costs were awarded against her…there is no reason to believe that the JCCF, a frequent litigant, does not have the resources to make good on its promise and so this was in effect an agreement by the JCCF to use its resources to indemnify Ms. Servatius for any award of costs against her."

[38] The court went on to note that "It would have been preferable for Ms. Servatius to be transparent to the judge about the JCCF funding, as it is clearly relevant to the public interest analysis that a special interest group is funding the litigation, not the named petitioner."

[39] Given the revelation about the JCCF's funding of the litigation, the court referred to and embraced the sentiment expressed in *Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131, that in litigation "purporting to advance public interest arguments '[i]t is generally not appropriate for 'ghost' parties to lurk in the background, providing extensive funding, evidence, advice or information'."

[40] The court went on to say that:

> "Therefore, where as here, a party is seeking to avoid the ordinary costs rule on the basis that the litigation is public interest litigation and on the basis that the named party cannot afford costs, it is necessary for the courts to know who is truly financing that party's lawsuit and who is truly at risk for the potential costs award."

[41] The B.C. Court of Appeal proceeded to set aside the judge's costs award and substitute an order following "the ordinary rule" requiring Ms. Servatius to pay the school board's costs of the original hearing and the appeal.

E. The *Hawke* Decision

[42] Returning to *Hawke*, Seneca notes a similar dynamic at play in that case. That is, Tranquilli J. assumed (as set out in paragraph 9 of her decision), that the student applicants in that case had no ability to finance the application. In paragraph 10, Her Honour said that "...the participation of the Democracy Fund must attract consideration in the costs assessment".

[43] Seneca points out that "The Democracy Fund acted as counsel for the student applicants in *Hawke* and financed their litigation in a similar manner to that of the JCCF and the Student Applicants (albeit the Democracy Fund was upfront about this relationship)."

[44] In that regard, Justice Tranquilli observed, relative to the role of the Democracy Fund:

> "The Democracy Fund, via the applicants, has not asserted that it is, in fact, unable to pay a costs award either at all or at the amount sought by the university. This omission makes sense, given the Fund's own website acknowledges that its purpose

> is dedicated to constitutional rights, advancing education and relieving poverty, promoting those interests through litigation and public education."

[45] The mandate and apparent solvency of the Democracy Fund led Tranquilli J. to conclude:

> "The consequences of the litigation are likely readily absorbed by the university. But in my view, the costs burden of this litigation is not one to be reasonably visited upon a public institution who collects tuition and is charged with the responsibility of delivering education to its students as well as responsibilities to its staff and faculty. In the context of considering costs where the application was brought by an organization constituted for litigation purposes versus a publicly funded post-secondary institution, it would be unreasonable that the applicants, through their soliciting organization, the Democracy Fund, would not expect to bear the financial burden in the event of a loss."

F. The *DeLarue* Decision

[46] To similar effect, Seneca also relies on the decision of this court in *DeLarue v. Kawartha Pine Ridge Public School Board* (a decision cited by the Student Applicants in their submissions). In that case, the applicants were found to be engaged in public interest litigation because, in contrast to this case, the applicants in *DeLarue* had no direct or pecuniary interest in the proceedings. In terms of costs, the court noted that the applicants had raised about $250,000.00 to fund their application. It held that as such, and notwithstanding the characterization of their application as public interest litigation, the applicants should nonetheless pay costs. In making this determination, the court contrasted the applicants' situation with that of the respondent school board, saying:

> "By contrast, the respondent is a publicly funded school board. Its funding is inelastic, depending entirely on a formulaic granting structure determined by the Ministry of Education. Money spent on this litigation will have an impact on other budget lines that are used directly or indirectly to support student achievement."

[47] Seneca concludes on this point by saying that "in the event that this case is not found to be an appropriate case for awarding costs against a non-party, the Student Applicants should nevertheless bear the full brunt of the costs award as the involvement of the JCCF should be considered when determining who…should pay costs. This is consistent with the decision of the Court of Appeal in this case at paragraph 19".

[48] In its overall conclusion, Seneca says that because the JCCF's "political ideologies and financial interests" drove this litigation, it would be appropriate to award costs against the JCCF as a non-party. However, Seneca says, "given the caselaw heavily favouring awarding costs against the Student Applicants…due to the indemnification agreement between them and the JCCF, Seneca is entitled to its costs regardless of who the costs order is against".

[49] Finally, Seneca notes that time and costs could have been saved had the JCCF been upfront about its relationship with the applicants, and it is possible that the appeal could have been avoided.

The JCCF's Submissions and Analysis of Same

[50] The JCCF, in its submission, takes issue with various of Seneca's submissions.

A. The Question as to Public Interest Litigation

[51] On the question of whether or not this is public interest litigation, the JCCF first argues that Seneca conflates that question with the question of what costs consequences would follow from the characterization of the litigation. It asserts, fairly in my view, that these are separate analytical steps.

[52] It accepts and follows the four-part test that Seneca pulls from relevant cases to determine whether or not this is public interest litigation.

[53] JCCF argues that, on the first prong, that with some exceptions, "the Courts have accepted that public law questions arising out of the COVID-19 pandemic engaged matters of public interest". It also infers that in articulating my uncertainty, in my original endorsement, about whether or not Seneca would be seeking its costs, I implicitly recognized "the public interest dimension of this dispute". In fact, as noted above, that purported inference is not precisely apt. My uncertainty arose from the repeated characterization of the moving parties as single mothers of limited means (at a stage at which I was unaware of the JCCF's agreement to indemnify the moving parties).

[54] On the second criterion, as to the nature of the successful litigant, the JCCF argues that as a creature of statute, defined under relevant regulations as a "Crown agent" Seneca "operates as a public college accountable to the Minister [of Training, Colleges and Universities]". It says I recognized this by referring to Seneca at one point in my decision as "public institution". On this point, while there is no doubt that I recognized the public aspect of Seneca's profile as a College, I also note the observations in *Hawke* and *DeLarue* in which the fact that educational institutions rely in part on public funding is anything but an invitation to assume they have capacity to pay costs awards (without consequences to their operations).

[55] On the question of the nature of the unsuccessful litigant(s) the JCCF, while acknowledging that the moving parties "may have stood to benefit personally if the proceeding succeeded" asserts that "Courts have acknowledged that a litigant's private interests can coincide with public interest motivations, including in the context of COVID-19 Charter challenges". On this issue, the JCCF argues that the fact of its indemnity agreement shows that the JCCF, as a "public interest organization and registered charity held a sincere view that the litigation was in the public interest".

[56] On the fourth and final parameter, the JCCF says that it should not be controversial that Seneca is better-positioned to "weather the consequences of any decision on costs". It says that, inasmuch as the JCCF is a registered charity, any costs it is required to pay will divert funds from other public interest purposes. It says that by contrast, Seneca is "backstopped by the resources of the provincial government" such that the impact of the costs of defending this proceeding should be understood as negligible.

[57] With respect to the four-part test, I accept and adopt the analysis undertaken by Tranquilli J. in *Hawke* (as excerpted in paragraph 18 above). I find that the moving parties had a clear stake in the outcome of the litigation, and that, while concerning matters also of public interest, this litigation does not rise to the level of the rare category that Tranquilli J. observes should be reserved for those "truly exceptional" cases meriting characterization as public interest litigation. It is fair to observe, as Seneca does in its argument, that this case was one of many cases during the time frame in which I heard this motion, challenging various policies and other outgrowths of the pandemic in schools and places of employment. While important to the individual litigants, and consistent with the JCCF's public agenda, this case does not in my view meet the stringent criteria to qualify as public interest litigation per se.

B. JCCF's Argument re Costs Against it as a Non-Party

[58] The JCCF then argues that this court has no jurisdiction, in the circumstances at hand, to order costs against it as a non-party. That is, while acknowledging that *Laval Tool* confirmed the court's "statutory and inherent jurisdiction to order costs against a non-party", the JCCF argues that the court's jurisdiction to do so is limited and that the necessary conditions are not met here.

[59] Importantly, the JCCF points out that in the Court of Appeal for Ontario's decision in this matter, the court found that Seneca could not meet the test for statutory jurisdiction in this case, in that "JCCF would not have had status to bring the injunction motion nor was there any evidence that the students were put forward to protect JCCF from liability for costs". As such, the JCCF maintains, if there is a basis for a costs award directly against it, that award would have to be grounded in the court's inherent jurisdiction.

[60] In fairness, Seneca did not and does not particularly argue otherwise. In its original submission, as set out above, Seneca argued for a costs order against JCCF as a non-party, arguing in effect that it was open for the court to find JCCF's conduct as amounting to an abuse of process.

[61] On that note, the JCCF also points out that the Court of Appeal expressed significant reservations about the suggestion that the JCCF engaged in an abuse of process. The court observed that there was no evidence of the JCCF having instigated the litigation for an improper purpose, and no evidence before it to indicate that the JCCF was in the position of a "maintainer" as discussed in *Laval Tool*. On balance, I agree. I had concerns about the JCCF's motives and conduct, as set out in my original costs decision, but find, with the additional guidance from the Court of Appeal and in the caselaw now brought to my attention, that the evidence before me does not meet the threshold for the JCCF to bear costs directly as a non-party.

C. JCCF Says the Indemnity Agreement is "Largely Irrelevant" (and Analysis)

[62] Finally, with respect to the implications of the indemnity agreement, the JCCF argues that the existence of the indemnity agreement is "largely irrelevant."

[63] In advancing this argument, JCCF reiterates and relies upon its position that this is public interest litigation. For the reasons set out above, I do not accept this characterization.

[64] JCCF also denies that the moving parties ever sought to avoid a costs order "on the basis of an inability to afford costs," and that as such the non-disclosure of the existence of the indemnity agreement is not relevant.

[65] I disagree. I note again my uncertainty in my original endorsement about whether or not Seneca would seek its costs, and the fact that, as set out above, there were repeated references in the submissions on behalf of the moving parties to the fact that they were both single mothers of limited means subsisting in part on the basis of student loans. I see no particular reason to tell me this, other than for purposes of my consideration of costs.

[66] I find it disingenuous and somewhat troubling that the JCCF, having funded the litigation and having agreed to indemnify the moving parties in connection with any costs order, now purports to say that the existence of the indemnity agreement was not relevant, and did not need to be disclosed, including during the original argument about costs, and even to the Court of Appeal. JCCF maintains this position despite the clear guidance from the Court of Appeal that "JCCF was obliged to reveal that information". I accept, as also noted by the Court of Appeal, that I ought to have been alive to and insisted on disclosure of any indemnity arrangement before making my costs award, but in my view my failure to make that inquiry does not obviate JCCF's independent obligation to advise the court of any such agreement.

[67] This is all the more so given the findings of the B.C. Court of Appeal in *Servatius*. In particular, given the court's pointed admonition that the lower court was not told about the JCCF's indemnity agreement in that case, and its concerns about the applicant's invocation in that case of public interest litigation and "the misleading assertions about Ms. Servatius' capability of weathering the burden of paying a costs award", I would have expected the JCCF (and the Student Applicants) to be forthcoming about the indemnity agreement, without the intervention of the Court of Appeal here.

D. Costs Discounts Based on Public Interest Aspects of Cases

[68] Finally, the JCCF notes that in cases in which there has been a dimension of public interest, including where, as here, important constitutional issues have been raised, courts have often ordered costs at a discount from the amount sought.

[69] Even in *Hawke*, on which, the JCCF fairly observes, Seneca places particular emphasis, Tranquilli J. made a costs order reflecting a discount from the amount claimed.

[70] Here, my willingness to consider a discount must be balanced by my concern about the non-disclosure of the indemnity agreement.

The Arguments of the Student Applicants

[71] The Student Applicants, in their submissions, in large part echo the submissions of JCCF, albeit from a slightly different perspective.

A. Arguments re Public Interest (and Analysis)

[72] They argue that the "public interest aspect" of the case ought to cause the court to exercise its discretion against ordering any costs at all. They say that Seneca's submissions are out of step with the current trend in the law whereby, since about 2003 "the cases began to significantly favour public interest litigants". The Student Applicants maintain that this trend reflects an increased willingness to put access to justice above other considerations, particularly when "ordinary citizens…seek to resolve matters of consequence to the community as a whole".

[73] Against this backdrop of the current trend as the Student Applicants describe it, they argue that the Carter factors cited by Seneca are "simply inapplicable" and that Seneca's suggestions that "there is an extremely high standard", that "discretion is only positively applied in rare and exceptional circumstances" and that the "the impact of the litigation must be significant and widespread" are similarly misplaced. The say that these submissions are "wrong and without any basis in the jurisprudence."

[74] Having reviewed and carefully considered the various cases to which the Student Applicants refer as reflecting the "current trend" I find that they do not establish these propositions, at least not in the unequivocal way in which the Student Applicants characterize them. In my view, the cases cited by the Student Applicants, including the COVID-19 cases, taken together, support the notion that where there is an obvious public interest at stake, and particularly where the applicants have no personal stake in the outcome, courts tend to be relatively lenient on costs, often exercising a discretion to forgo or substantially minimize costs awards against the party pursuing the public interest.

[75] Where, as here in my view, the public interest aspects are less clear, and/or clouded by self-interest in the outcome, the public interest aspects tend to lead to a lesser or no discount from the usual cost consequences. Perhaps the most salient recent example of the court's disinclination to help a purported "public interest" litigant on the costs side is found in *Friends of Toronto Public Cemeteries Inc. v. Mount Pleasant Group of Cemeteries*, in which the principal litigant was found to have been incorporated for the litigation in question in order to advance interests characterized as reflecting "a distinct element of NIMBYism."

[76] The Student Applicants also state emphatically that "this case is **not** analogous" (bolding in original) to the *Hawke* decision, which they say is "the centerpiece of Seneca's submissions". It appears, in reading the Student Applicants' (one paragraph) further discussion on this point, that their argument is that, because the challenge in that case was based on the *Freedom of Information and Protection of Privacy Act*, rather than on the *Charter of Rights and Freedoms*, it was evident that *Hawke* was not "particularly in the public interest" as compared to the case at hand. While there is no gainsaying the importance of the Charter in advancing matters of public interest, the implication that every case that cites the Charter rises to the level of public interest litigation, whereas cases relying on other statutes do not, is not, in my view, a compelling argument, and overlooks the individual nuance of the cases the Student Applicants cite. As set out above, the fact that the case deals with COVID-19 issues also does not mean, at least on its own, that the case necessarily becomes one of public interest litigation.

B. Arguments re Indemnity Agreement (and Analysis)

[77] Nor are the Student Applicants assisted, I find, by their submissions concerning the indemnification agreement.

[78] They argue that the indemnification agreement is immaterial because they did not purport any inability to pay. More specifically they say: "the Student Applicants did **not** previously raise an inability to pay, as they have an indemnification agreement with the JCCF due to their limited means" (bolding in original).

[79] It strikes me as disingenuous, and far from appropriately transparent, for the Student Applicants to say that they never claimed impecuniosity because they had an undisclosed indemnity agreement with the JCCF.

[80] In any event, as set out above, the submissions before me on behalf of the Student Applicants in the original injunction motion, albeit delivered by counsel from the JCCF, featured repeatedly the notion that the Student Applicants were single mothers of limited means.

[81] Again, I am uncertain what relevance those submissions, which as set out above are reiterated by the Student Applicants in their current submissions, could have to any issue other than costs. As noted, these submissions (in the absence of disclosure of the indemnity agreement) were effective, causing me to wonder explicitly in my original endorsement whether Seneca would be seeking its costs.

[82] Moreover, it appears that the Court of Appeal for Ontario, in its decision overturning my original costs decision, also formed the impression that the Student Applicants were unable to afford the costs of their proceeding. The Student Applicants maintain that the Court of Appeal's discussion, in paragraph 20 of its decision "was obiter and based upon a wrong assumption." In that paragraph the court quoted with approval an excerpt from Servatius to the effect that where a party is seeking to avoid costs because its case constitutes public interest litigation and "on the basis that the named party cannot afford costs" then disclosure of who is truly financing the lawsuit is required.

Overall Conclusions

[83] In all of the circumstances, I find that:

(a) This litigation is not properly characterized as one of the relatively rare cases of (predominantly) public interest litigation;

(b) There is insufficient evidence to find the JCCF directly liable as a non-party;

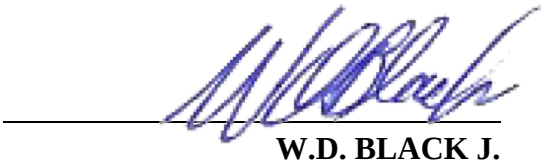
(c) However, knowing now that the indemnity agreement is in place, such that my concern about the impecuniosity of the moving parties is attenuated, I am prepared to make the costs order against the moving parties (the Student Applicants);

(d) I am concerned about the non-disclosure of the indemnity agreement by either the Student Applicants or, in particular, the JCCF (particularly inasmuch as the JCCF

has previously been admonished by the B.C. Court of Appeal for failing to disclose an indemnity arrangement in a previous case);

(e) Accordingly, while I am prepared to discount my original costs order (as was done in *Hawke* and other cases) having regard to a public interest component in the case, albeit a modest one, I am only prepared to discount that original costs order by $20,000.00;

(f) As such, I order costs payable to Seneca by the moving parties in the amount of $90,000.00, plus disbursements of $46,461.99.



W.D. BLACK J.

DATE: MAY 15, 2024