PERSONAL COSTS AWARDS AGAINST LAWYERS: ADVOCATING FOR EXTREME CAUTION AND *MALA FIDES*

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Introduction

Lord Brougham was perhaps the greatest, and certainly the most celebrated, advocate of his day. His often quoted speech in his defence of Queen Caroline, underscored the singular duty of an advocate and the concept of undivided loyalty stating: "An advocate, by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, that client and none other."[1]

In reality, the advocate owes a number of duties to the various participants in proceedings. Obviously, the lawyer's primary duty is to the client. The lawyer also owes duties to opposing counsel to, for example, avoid sharp practice or incivility. The lawyer is also an officer of the court and owes duties to the court directly. Good advocacy rarely if ever sees these duties in actual conflict.

Good advocacy in the best interests of the client does not benefit from incivility or sharp practice and certainly never in breaching a lawyer's duty to the court. There are occasions where the advocate steps beyond mere zealous advocacy. In such situations, the court has always retained the inherent jurisdiction to govern both its process and its officers.

In recent years, there has been a growing number of cases that involve requests for costs awards personally against lawyers. The

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1. Showell Rogers, The Ethics of Advocacy, 15 L.Q. Rev. 259, 269 (1899) (quoting Lord Brougham).

authority to make such an order, while historically part of the inherent jurisdiction of the court, can be found in court rules. In Ontario, rule 57.07(1) of the *Rules of Civil Procedure*, for example, expressly empowers a court to order a lawyer to personally pay costs where the lawyer "causes costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default."[2]

The order itself can take a variety of forms. First, the court can make an order that disallows costs between the lawyer and client or direct the lawyer to repay to the client money on account of costs. Second, the court can order the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party. Lastly, and the most concerning for the purposes of this discussion, the court can order the lawyer personally to pay the costs of any party.

In family law cases in Ontario, rule 24(9) of the *Family Law Rules* similarly sets out the various orders that courts can award when a lawyer has "run up costs without reasonable cause or has wasted costs."[3] One of those orders is to hold the lawyer personally liable to pay the costs of any party.

The granting of a costs order personally against a lawyer is serious and should only be made with extreme caution. Courts must be mindful of not only the monetary sanction and penal nature of such an order but also the great stigma a decision of this nature carries. Although courts have recognized that they should proceed cautiously when considering whether a personal costs award should be made against a lawyer, the rules today are, arguably, being applied more loosely than perhaps intended.

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2. R.R.O. 1990, Reg. 194. The costs rules in Canada's other common law provinces and in the Federal Court of Canada are as follows: Alberta: *Alberta Rules of Court*, Alta. Reg. 124/2010, Rules 10.49 & 10.50; British Columbia: *Supreme Court Civil Rules*, BC Reg. 168/2009, Rule 14-1(33); Manitoba: *Court of Queen's Bench Rules*, Man Reg 553/88 , Rule 57.07(1), New Brunswick: *Rules of Court*, NB Reg 82-73, Rule 59.13, Newfoundland: *Rules of the Supreme Court*, SNL 1986, c. 42, Sch D, Rule 55.14(2), Northwest Territories: *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. R-010-96, Rule 644; Nova Scotia: *Nova Scotia Civil Procedure Rules*, Royal Gaz November 19, 2008, Rule 77.12(2), Prince Edward Island: *Rules of Civil Procedure*, Rule 57.06(1), Saskatchewan: *The Queen's Bench Rules*, Rule 11-24(1); and Federal Court of Canada: *Federal Courts Rules*, SOR/98-166, Rules 404(1),(2),(3).

3. O. Reg. 114/99. For personal costs awards against lawyers in family law proceedings in Canada's other common law provinces and territories, the reader is directed to review the applicable legislation and rules in their respect jurisdiction.

Notwithstanding that the early development of the law emphasized that an order holding a lawyer personally liable for costs was an exceptional order and subject to a high threshold of egregious conduct in a proceeding, courts appear to have adopted a lower threshold of late that potentially now exposes a lawyer to a personal costs award for merely being a zealous advocate. Zealous and fearless advocacy is to be encouraged. Precedents are made and the law advances on the backs of novel arguments. Courts should, accordingly, be cautious in dampening the vigor and creativity of arguments made or positions taken which, while perhaps not in conformity with standing authority, do not offend any of the duties owed to opposing counsel or the Court itself.

A review of the effect of the rule itself makes it clear on its face that the consideration of the Court necessary for the imposition of a personal cost sanction places the lawyer in an immediate conflict of interest with their own client. In civil and family matters, the general rule is that the losing party pays the costs of the successful party on such scale or amount as the court deems just. In addition, unsuccessful litigants are generally responsible for their own lawyer's bill unless the matter was undertaken on a contingency or there had been a prior agreement. Obviously on one level it is always in the client's interest that someone else, even their own lawyer, pay an adverse costs award or that they not be responsible for their own lawyer's account. A lawyer could not, accordingly, act for a client and argue against such an order on behalf of a client. The rule itself immediately pits the interest of the client against the personal interest of the lawyer.

It has been noted that the differences in the approaches taken by the courts may stem from a tension between the court's inherent jurisdiction and its statutory authority. Courts possess inherent power to manage and control the proceedings conducted before them.[4] In that regard, a court's power extends to preventing the use of procedure in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute.[5] This, in turn, relates to the court's right and duty to supervise the conduct of lawyers who appear before them

4. See *Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41 (S.C.C.); *R. v. Anderson*, 2014 SCC 41 *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, 373 D.L.R. (4th) 577 (S.C.C.).
5. See *Canam Enterprises Inc. v. Coles* (2000), 194 D.L.R. (4th) 648, 5 C.P.C. (5th) 218, 51 O.R. (3d) 481 (Ont. C.A.), reversed 2002 SCC 63, [2002] 3 S.C.R. 307, 220 D.L.R. (4th) 466 (S.C.C.).

and penalize any misconduct that interferes with the administration of justice.

Lawyers must always be mindful of the privilege associated with the right to practice law and appear before courts and tribunals. As with any privilege there is a concomitant responsibility on the part of the lawyer to observe the obligations owed to the Court as its officer. Canadian courts have always had the "inherent jurisdiction to order lawyers to pay costs as part of their power to control officers of the court and under their authority associated with the law of abuse of process and contempt of the court."[6] This power to control its own process and officers by awarding costs against a lawyer personally applies "in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members."[7] These sanctions are not mutually exclusive, but rather can be harnessed together and imposed concurrently in relation to the same conduct.[8]

The inherent jurisdiction of the court is generally only and quite properly engaged sparingly. Sparing application of this power supports and balances the mutual societal benefits of zealous and fearless advocacy on the one hand with due respect for the administration of justice on the other.

However, the costs rules have caused some Ontario courts to provide a plain or literal meaning to the ability of a court to award personal costs against a lawyer, and thus make orders where there is simply undue delay, ordinary negligence, as opposed to gross negligence, or other default rather than requiring that a lawyer acted in bad faith or in some reprehensible way deserving of the court's discipline.[9] To do so, lowers the threshold of potential liability and arguably tips that balance away from the important societal good of an independent bar, fearless in its protection and advancement of its client's interest.

In our view, the threshold for holding a lawyer personally liable for costs in a proceeding ought to be a high one. The consequences of such orders are severe and should be meted out only in the clearest of cases. These consequences include not only the individual impact on the lawyer both immediately in terms of monetary penalty and on a

6. Paul Perell, "Ordering a Solicitor Personally to Pay Costs" (2001) 25:1 Advoc Q 103 at 103.
7. *Québec (Directeur des poursuites criminelles et pénales) c. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, 408 D.L.R. (4th) 581 (S.C.C.) at para. 20.
8. *Ibid.*
9. Court of Appeal for Ontario's Consultation Paper – Rule 57.07 – Liability of Solicitor for Costs.

long term basis in terms of damage to personal reputation but also to the bar and society generally by putting a lawyer's personal interest of self-preservation in play at the potential expense of the client.

Today's courts are too easily awarding costs personally against lawyers for zealous advocacy rather than objectionable and improper tactics that waste time and court resources during a proceeding. Zealous advocacy should not be punished with a personal costs award. Incorporating a high threshold into the interpretation of the rules when considering whether a personal costs award should be made against a lawyer is supported by Supreme Court of Canada jurisprudence and the highest and most noble traditions of the Bar. A high threshold will avoid placing lawyers in a potential conflict of interest between their duties to a client and their duties to the court.

Common Law Origins of the Statutory Rules

The origins of the statutory rules which recognize a court's ability to award costs against a lawyer are found deeply rooted in the common law. The common law origins are tethered to the role of the lawyer as an officer of the court. The leading case on the court's authority at common law to impose a personal costs award against a lawyer is the House of Lords decision in *Myers v. Elman*[10], which was later adopted in Canada.

In *Myers*, the House of Lords specifically reviewed the circumstances in which a lawyer could be held personally liable for costs. At trial, the court had found that the lawyer representing the defendants in a fraud case (and his clerk) had been guilty of professional misconduct as a solicitor and an officer of the court in the conduct of the defence of the case. More specifically, the trial judge found that the lawyer's clerk had knowingly prepared inadequate and false affidavits of documents and that this conduct had "...increased the plaintiff's difficulties, added to the expense, and obstructed the interests of justice."[11] The appellate court rescinded the personal costs award. The House of Lords restored the trial judge's order.

In assessing the lawyer's responsibility for the clerk's conduct, the House of Lords set a high threshold that needed to be met in order to justify a personal costs order. In his 2001 article entitled "Ordering a Solicitor to Personally Pay Costs", Justice Perell explained that according to the common law rule, an order directing a lawyer to

10. (1939), [1940] A.C. 282, [1939] 4 All E.R. 484 (U.K. H.L.).
11. *Ibid,* per Viscount Maugham, at p. 487.

personally pay costs was "...an exceptional order that could only be justified if the lawyer had been grossly negligent or seriously derelict in his or her duty to the court."[12]

Indeed, as described in Lord Wright's judgment in *Myers*, mere mistake or error in judgment was insufficient to hold a lawyer personally liable for costs.[13]

Viscount Maugham, in a separate judgment, stated as well, that the primary object of a personal costs order against a lawyer was "...not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured."[14] Accordingly, the personal costs order was intended to be compensatory in nature.

The high threshold established by the common law and the court's exercise of its inherent jurisdiction is reflected in leading cases from the Supreme Court of Canada, which have identified bad faith as a characterizing feature in the analysis that a court should undertake when considering whether costs should be ordered personally against a lawyer. Arguably the common law recognized the penal nature of such an award and its severe reputational consequences on a lawyer. In light of the gravity of the order some element of bad intention was seen to be necessary. While the case law supports the concept of indemnification as the rationale of such an order and that if it is the lawyer that causes unnecessary costs to be incurred it is the lawyer that ought to bear responsibility for such wasted costs, the fact is that reported decisions in this regard often have a far more lasting negative impact on the lawyer than a monetary payment.

In *Young v. Young*,[15] the Supreme Court of Canada examined the issue in a case involving contentious litigation about child custody and access in the context of divorcing parents who had differing opinions about the religious instruction of their children. The trial judge had made a personal costs order against the husband's lawyer on the basis that the lawyer caused the proceedings to be unnecessarily lengthened. Further, the trial judge found that the best interests of the child and their welfare was completely lost by both the respondent and his lawyer. However in making the personal costs award, the trial judge did not find that the lawyer had acted in contempt of court.[16]

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12. Perell, *supra* note 6, at p. 104.
13. *Ibid,* per Lord Wright, at p. 509.
14. *Ibid,* per Viscount Maugham, at p. 488.
15. [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41 (S.C.C.).
16. *Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41 (S.C.C.) at para. 216.

The British Columbia Court of Appeal held that no order for costs should have been made against the lawyer. The appellate court found that the trial judge's criticism of the respondent's lawyer related to his conduct in bringing the action and reaffirmed that the principle on which costs were to be personally awarded against a lawyer was compensatory in nature rather than as a tool to punish a lawyer.[17]

Writing for the Supreme Court of Canada, Justice McLachlin, as she then was, explained that "any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that *the lawyer acted in bad faith* in encouraging this abuse and delay."[18] (Emphasis added) By identifying bad faith behaviour as a characterizing feature in the analysis, the Supreme Court of Canada affirmed that a high threshold needed to be met in order to hold a lawyer personally responsible for costs in a proceeding.

Justice McLachlin further affirmed the requirement for a high threshold when she explained that the court's jurisdiction to award costs personally against a lawyer was to be cautiously exercised because an award of such nature had direct implications on a lawyer's duties to his or her client, the legal profession and the administration of justice at large. Justice McLachlin stated:

> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.[19]

This observation is important because it reveals the ways in which cost awards under rule 57.07(1) of the *Rules of Civil Procedure*, or at the very least the threat of them, can deter zealous or innovative advocacy and thereby inhibit a lawyer's role as an advocate, leaving the lawyer in conflicting duties owed to clients, the court, opposing counsel and the parties to the proceedings. Although the rule is intended to compensate aggrieved successful parties for wasted costs, the possibility of facing possible cost consequences for a lawyer's involvement may deter lawyers from their legal duty of

17. *Young*, *supra* note 15, at para. 22.
18. *Ibid,* at para. 27.
19. *Ibid.*

resolute or zealous advocacy. It is in the public interest that lawyers be fearless. The threat of personal financial sanction has an obvious element of deterrence which could theoretically inhibit that sentiment.

In the more recent decision of *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, the Supreme Court of Canada again affirmed a high threshold for awarding personal costs against lawyers, noting that the court's power in doing so must not be exercised in an arbitrary and unlimited manner but rather with restraint and caution.

In this case, an experienced criminal lawyer represented multiple clients who had been charged with impaired driving. On the morning of a scheduled disclosure motion, the lawyer issued a series of motions challenging the jurisdiction of the judge who was scheduled to hear the motion. The lawyer alleged that this judge was biased. However, the series of motions issued by the lawyer were not required because a different judge heard the disclosure motion.

During that hearing, the lawyer objected to testimony from the Crown's expert and at a lunch break prepared a new series of motions for writs of prohibition challenging the motion judge's jurisdiction and alleging bias. Service of these prohibition motions suspended the disclosure motion hearing until those motions could be heard by the Quebec Superior Court. That court dismissed the prohibition motions and awarded costs personally against the lawyer. In ordering costs against the criminal lawyer personally, the Quebec Superior Court had held that doing so was justified in the case of a "...frivolous proceeding that denotes a serious and deliberate abuse of the judicial system."[20]

The Quebec Court of Appeal set aside the personal costs award on the basis that the lawyer's conduct did not constitute exceptional conduct worthy of such a sanction.[21]

Although the Supreme Court of Canada restored the personal costs award against the lawyer, the Court stated that a costs award against a lawyer personally can be justified only on an "exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice."[22] This high threshold would be met only in circumstances where a court had before it an "...unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious

20. *Jodoin*, *supra* note 7, at para. 3.
21. *Ibid,* at para. 3.
22. *Ibid,* at para. 29.

abuse of the judicial system by the lawyer, or dishonest or malicious conduct on his or her part, that is deliberate."[23]

The Court outlined two important guideposts that apply to the exercise of the court's discretion when awarding costs personally against lawyers. The first relates to the specific context of criminal proceedings. The Court stated that "...the courts must show a certain flexibility towards the actions of defence lawyers."[24] In the criminal context, Chief Justice McLachlin explained that courts must consider how criminal proceedings differ from civil proceedings, including the fact that defence lawyers have a unique role in criminal proceedings that cannot be limited by the prospect of a costs award and the purely punitive, not compensatory, nature of cost awards.[25]

The second guidepost requires a court "to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial." The court's analysis must be limited to the specific issue before the court, such as the lawyer's conduct in the proceeding, not external facts that may demonstrate proof of a general propensity or bad character.[26]

Although the guideposts are helpful to the overall analysis of specific factual circumstances, the key point from both *Jodoin* and *Young* is that the Supreme Court of Canada has clearly directed that a high threshold must be crossed before a court orders that a lawyer be held personally liable for costs and that the court's power be rarely exercised. This makes good sense given that our legal system demands that parties have access to "loyal, vigorous and sometimes courageous representation from their advocates."[27] If courts too easily utilize their powers or the rules to impose personal costs awards against lawyers, lawyers will invariably become hesitant in providing vigorous and courageous representation to their clients.

The Rise of a Lower Threshold

Notwithstanding that the common law established a high threshold for an award of costs personally against a lawyer and that the decisions from the Supreme Court of Canada clearly outline that the court's power should be rarely exercised and that this type of costs award should only be made in exceptional cases, the rules leave

23. *Ibid,* at para. 29.
24. *Ibid,* at paras. 31-32.
25. *Ibid,* at para. 31.
26. *Ibid,* at paras. 3-34.
27. Perell, *supra* note 6, at p. 108.

room for the imposition of personal costs awards based on a lower threshold. The reason for this allowance is that the rules are not viewed as a codification of the common law.

In *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*,[28] the court flagged the distinction between the court's inherent jurisdiction and the development of the common law rule and the statutory rules. The court stated that "the criteria on which an order for costs may be made against a solicitor personally pursuant to [r]ule 57.07 and pursuant to the inherent jurisdiction of the court may differ."[29] Whereas the inherent jurisdiction of the court was based on its ability to control the conduct of an officer of the court such that a personal costs award could be viewed as a form of punishment, the statutory rules are premised on protecting and compensating a party who has been required to incur costs, without reasonable cause. The codification in the Rules appears to favour the principle of indemnification for costs thrown away coming from the cause of those wasted or inflated costs. The court noted the distinction in *Carleton v. Beaverton Hotel*, stating that rule 57.07(1) "clearly speaks to the issue of compensating parties for unnecessary costs."[30]

As a result of the distinction, a lawyer can be held personally liable for costs even though he or she was not "grossly negligent". In addition, "bad faith" is not a requirement under the statutory rule.[31] The statutory rule places greater emphasis on the result of the behaviour rather than the intention which motivated it.

In *Galganov v. Russell (Township)*,[32] the Ontario Court of Appeal reviewed the applicable test under rule 57.07 in a case where the lower court had ordered that 40 percent of a costs order (or $72,000) be paid personally by the applicants' lawyer. Although the application judge found that the lawyer had not acted in bad faith, she concluded that his conduct had caused costs to be incurred unreasonably. The application judge also noted that the lawyer was seriously unprepared, which amounted to negligence.

On the appeal, the lawyer contended that he was unable to respond to some of the allegations made against him because of

28. (1998), 16 C.P.C. (4th) 201, 77 A.C.W.S. (3d) 717, 51 O.T.C. 321 (Ont. Gen. Div.).
29. *Ibid,* at para. 14.
30. (2009), 314 D.L.R. (4th) 566, 96 O.R. (3d) 391, 185 A.C.W.S. (3d) 44 (Ont. Div. Ct.), at para. 24.
31. *Galganov v. Russell (Township)*, 2012 ONCA 410, 350 D.L.R. (4th) 679, 294 O.A.C. 13 (Ont. C.A.). at para. 18.
32. *Ibid.*

solicitor-client privilege and that the impugned steps in the litigation were undertaken on the instructions of his clients.

In allowing the lawyer's appeal, the appellate court explained that a two-step test applied to the determination of whether a lawyer should be held personally liable for costs. At the first step, the court was only required to inquire whether the lawyer's conduct fell within the rule in the sense that it caused costs to be incurred unnecessarily.[33]

With respect to rule 57.07(1) this means whether the lawyer's conduct "caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default." With respect to rule 24(9) of the *Family Law Rules*, this means whether the lawyer has "run up costs without reasonable cause or has wasted costs."

While the court is required to examine the facts of the case holistically, it must consider the specific incidents of conduct to determine whether the incidents fall within the rule. A holistic examination of the lawyer's conduct is intended to produce an "accurate tempered assessment."[34]

At the second step, the court retains a discretion on whether to impose a personal costs order against a lawyer. The Supreme Court of Canada's extreme caution principle enunciated in *Young v. Young* should be applied. Citing *Carleton*, the appellate court in *Galganov* stated that this means that:

> ...these awards must only be made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in [r]ule 57.07(1).[35]

The appellate court found that the application judge had erred in awarding personal costs against the lawyer because, among other reasons, she failed to separate the lawyer's conduct from that of his clients and used hindsight to evaluate a decision the lawyer made to propose certain witnesses, including one of his clients, as expert witnesses. These two erroneous findings were important to the application judge's overall view that the lawyer's negligent conduct caused the defendant Township to incur costs unnecessarily. While this was enough to set aside the personal costs award, the appellate court further stated that even if the lawyer had been negligent, his conduct did not merit the making of a personal costs award against him.

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33. *Ibid,* at para. 18.
34. *Rand Estate v. Lenton*, 2009 ONCA 251, 46 E.T.R. (3d) 183, 176 A.C.W.S. (3d) 864 (Ont. C.A.), at para. 5.
35. *Galganov*, *supra* note 31, at para. 22.

The appellate court also noted that in assessing the lawyer's negligence that an objective standard of care of a reasonably competent lawyer in the same position had to be applied. This required a recognition that the lawyer was acting on instructions or with the approval of his clients. As well, the court explained that it had to bear in mind that the lawyer's duty of care was owed to the client and the court, not the other side. "The rule was not intended to allow the frustration of the opposing party's counsel to be taken out against a counsel personally because he or she went down a series of blind alleys with his or her clients' instructions or approval."[36]

The notion of who is ultimately the cause of the costs being incurred as between a lawyer and a client is critical to the analysis. Viewed through the lens of the necessary high threshold, *Galganov* might suggest that a lawyer who follows instructions should not fear being subject to a potential personal costs order.

The lawyer, however, is the officer of the Court and the one who has ethical obligations. A lawyer is not free to simply follow client instructions without regard to those obligations.

A more recent decision from the Ontario Court of Appeal, *Falcon Lumber Ltd. v. 2480375 Ontario Inc. (GN Mouldings and Doors)*[37], demonstrates that client instructions will not render a lawyer immune from a personal costs award. In this case, a personal costs award in the amount of $6,246.54 was made against the defendants' lawyer on a motion in which the defendants' statement of defence was struck because, for a period of three years, they had wilfully disregarded court procedure and orders to make proper production and avoided the adjudication of the merits of the plaintiff's action.

The motion judge awarded personal costs against the defendants' lawyers on the grounds that:

- counsel had continually attempted to force on examinations knowing that their clients' Affidavit of Documents was incomplete, despite non-compliance with courts orders, producing new documents on the day of examination, and suggesting that missing documents could simply be asked during the examination;
- the defendants failed to produce Affidavits of Documents by the various dates represented by their counsel to the court;

36. *Ibid,* at para. 43.
37. 2020 ONCA 310, 325 A.C.W.S. (3d) 174, 2020 CarswellOnt 7147 (Ont. C.A.).

- counsel did not advise the court that after one of the defendant's went into receivership he had a new client, the receiver, and deal with the receiver's obligation to produce relevant documentation;
- a request for adjournment to permit counsel to retain its own counsel appeared to be another delay tactic since the subsequent appearance was without counsel; and
- at the hearing of the motion to strike the defendants' pleading, defendants counsel was aware that there had not been compliance with court orders, but said nothing until questioned by the motion judge.[38]

Although the lawyers were assumed to have followed the clients' instructions in undertaking these tactics, the motion judge found that in the circumstances a point had been crossed where the lawyers became complicit in the flagrant disregard of the Rules and court orders that had been made.[39]

The Court of Appeal refused the lawyer's request for leave to appeal the personal costs award.

In our view, a court should be cautious when considering if a personal costs award should be made against a lawyer because he or she was merely following the client's instructions. The relationship between a solicitor and a client is based on utmost good faith. A client must be confident that they can trust their lawyer and that their lawyer will carry out his or her instructions. Unless the lawyer is being asked to assist a client to participate in a crime or deliberately mislead a court or permit a client to mislead the court or commit some other ethical breach of the *Rules of Professional Conduct*, a lawyer should not be financially punished for obeying his or her client's instructions. To hold otherwise, sets what should be a high bar too low.

More importantly, the question underlines the immediate conflict that the invocation of the Rule places the lawyer in. In order to defend a suggestion that the lawyer will be personally responsible for costs, the lawyer is compelled to advise that the actions were taken on the instructions of the client. This obviously puts the communication between the lawyer and the client in issue and threatens privilege.

Again, on a superficial level it is in the client's interest that someone else pay an adverse costs award. If the privilege belongs to the client only the client can waive that privilege. A lawyer faced with the threat of a personal costs award from a court and a client that is

38. *Ibid,* at para. 87.
39. *Ibid,* at para. 88.

unwilling to waive privilege over the fact that the lawyer was specifically instructed to undertake a matter in a certain way is accordingly in an untenable position.

In *Beatty v. Wei*[40] the court, on a refusals and undertaking motion, awarded costs against a lawyer personally for improper conduct during a cross-examination. The defendant alleged that during an out-of-court examination, the plaintiff's lawyer had repeatedly and improperly answered questions on behalf of his client and interfered with the examination's proper conduct by, among other things, objecting to proper questions, telling the defendant's lawyer what questions he should ask and how he should ask them, and refusing to allow the plaintiff to answer questions without stating proper grounds. The court concluded that the lawyer's conduct unnecessarily and unreasonably lengthened the time to complete the plaintiff's cross-examination. In addition, the lawyer's conduct affected the quality of the examination record.

The court ordered the lawyer to pay a portion of the defendant's costs in an amount which represented the extra-time spent conducting the cross-examination as a result of the lawyer's conduct.[41]

Arguably, this decision should be a cause for concern because often during out-of-court examinations lawyers are obligated to interrupt the questioning of opposing counsel or suggest to opposing counsel that a question ought to be posed differently in order to avoid an objection or a refusal.

As well, counsel often get into heated exchanges or debates which make it appear that counsel are either answering questions or describing their theory of the case. This can also properly be viewed as a form of zealous advocacy.

The court's decision in *Beatty*, however, does not clearly demarcate when the line for otherwise zealous advocacy might be crossed so as to become a ground for a personal costs award to be made against a lawyer.

Lastly, *Best v. Ranking*[42] potentially raises some concerns for lawyers who commence actions that may be weak or have little chance of success or, certainly, that are struck for constituting an abuse of process on the grounds that the action is an attempt to re-

40. 2017 ONSC 2922, 279 A.C.W.S. (3d) 476, 2017 CarswellOnt 6980 (Ont. S.C.J.).
41. *Ibid,* at para. 25.
42. 2016 ONCA 492, 351 O.A.C. 132, 268 A.C.W.S. (3d) 296 (Ont. C.A.), leave to appeal refused *Slansky v. Kingsland Estates Ltd.*, 2017 CarswellOnt 1205, 2017 CarswellOnt 1206 (S.C.C.).

litigate issues that have already been decided. In this case, the plaintiff had commenced two complex actions. The first action claimed damages for negligence and economic loss against 62 defendants. In 2009, this action was stayed on jurisdictional grounds and was eventually dismissed because the plaintiff failed to pay costs owing to the defendants.

While the plaintiff was seeking leave to appeal to the Supreme Court of Canada in connection with the first action, he commenced a second action. The second action named 39 defendants. Claims were made against the opposing lawyers from the first action and their firms, and against the police and private investigators.

The defendants advised the plaintiff's lawyer that they intended to contest jurisdiction and that they would accordingly not be filing a statement of defence.

The parties disagreed over jurisdiction and eventually the defendants were noted in default after failing to file a statement of defence or serving a notice of motion to contest jurisdiction by a certain date. The defendants then sought to set aside the noting in default.

Consent was eventually granted to setting aside the noting in default and 21 of the 39 defendants proceeded with motions to strike the second action on the grounds that it was frivolous, vexatious and an abuse of process.

The court held that the second action was an abuse of process and doomed to failure. The motion judge found that the second action represented "a transparent attempt to re-litigate issues that had already been decided" and that the plaintiff's lawyer should have known that the litigation would consume resources of a strained justice system and impact the resources of the defendants. The motion judge explained that the entire action wasted costs unnecessarily and that the lawyer was instrumental in this waste. It was found that the lawyer should personally pay costs for the following reasons:

- He drafted a claim that was an abuse of process because it was a collateral attack on prior rulings and sought to relitigate the same issues;
- He issued and served the claim;
- He based his legal rationale for commencing the action on a theory that had no chance of success;
- The causes of action were not properly pleaded and lacked any factual basis;

- He advanced serious and scandalous allegations in the claim, factum and oral submissions of fraud, dishonesty, criminal conduct, false representations and other improper conduct against various professional individuals knowing that courts had previously ruled that those same allegations were baseless; and
- He acted on unreasonable instructions from his client, or provided unreasonable advice to his client, regarding the scheduling of the respondents' jurisdiction motion.

Although the appellate court noted that the motion judge had emphasized in her finding that the action lacked merit and overall that the action was an abuse of process, but that these are factors which should not on their own be the basis for a personal costs award against a lawyer, the appellate court upheld the motion judge's decision.

The appellate court stated that the motion judge had also found that the lawyer had wasted costs unnecessarily by acting on unreasonable instructions and providing unreasonable advice to obtain those instructions.

In the circumstances, the appellate court did not interfere with the motion judge's decision. While standing alone, a personal costs award should not be made against a lawyer for merely commencing what a court ultimately determines to have been a weak case on behalf of a client, the appellate court appeared to accept that this was a factor that could be considered when making such an award.[43]

Restraint Has Been Exercised

Arguably, great restraint should be exercised before a lawyer is held personally responsible for costs and such an award should only be made in the clearest of cases. As set out in *Toronto Standard Condominium Corporation No. 1724 v. Evdassin,*[44] notwithstanding that there were certain aspects of a lawyer's conduct that the court identified as especially outrageous and reprehensible, the costs awarded in that case only rested on the applicant condominium owner.[45]

First, the applicant's lawyer made repeated, unsubstantiated allegations of professional misconduct against opposing counsel, falsely accusing counsel of misleading the court, violating court orders, abusing court processes, and being in a conflict of interest.

43. *Ibid,* at para. 50.
44. 2021 ONSC 7329, 2021 CarswellOnt 15713 (Ont. S.C.J.).
45. *Ibid,* at para. 10.

The court concluded that there was no merit to these allegations and that making baseless allegations of misconduct against opposing counsel is a recognized basis for making an enhanced costs award.[46]

Second, the lawyer repeatedly requested interim injunctive relief during case conferences without notice to the court or to opposing counsel.[47] By further failing to respond in a timely manner to correspondence from opposing counsel and the court, the lawyer's conduct added significantly to the cost and complexity of the matter.[48] The court specifically pointed out that one of the case conferences, which was convened to set a new date for the application, lasted for more than 90 minutes because the lawyer was argumentative, disruptive, and belligerent.[49]

However, the court did not award costs personally against the applicant's lawyer, but rather held that this was one of the rare cases where costs on a full indemnity basis was justified to be paid by the applicant. The court further concluded that the conduct of both the applicant and his lawyer was egregious, reprehensible and abusive in light of the entirely reasonable settlement offer made by the opposing party. Had the applicant acted reasonably and accepted the offer to settle, significant costs would have been saved as a result and the opposing party would not have been subjected to abusive conduct on the part of the applicant and his lawyer.[50]

In *Walsh v. 11124660 Ontario Ltd.,*[51] Justice Lane exercised substantial restraint in refusing to award costs personally against a lawyer who was found to have caused some delays by appearing without tabs in court, making lengthy speeches and repetitive arguments, as well as voicing knee-jerk objections to refute what was said about his client's case. Further, the lawyer had specifically accused His Honour twice of bias and told him that he had not been listening closely to the evidence before him on a certain point.

Despite this misconduct, Justice Lane held that while the transgressions were unpleasant occasions, rude, and occasionally bordering on contempt, they did not cumulatively cause a loss of 15 trial days.[52] His Honour emphasized that costs awards under rule 57.07(1) are meant to be compensatory and that for this reason, a

46. *Ibid,* at para. 22.
47. *Ibid,* at para. 23.
48. *Ibid,* at para. 24.
49. *Ibid.*
50. *Ibid,* at paras. 28 and 29.
51. (2007), 155 A.C.W.S. (3d) 701, 2007 CarswellOnt 982, [2007] O.J. No. 639 (Ont. S.C.J.), additional reasons (2007), 59 C.C.E.L. (3d) 238, 2007 CarswellOnt 4459, [2007] O.J. No. 2773 (Ont. S.C.J.).
52. *Ibid,* at paras 36-37.

court must be certain regarding what jurisdiction it is invoking in making these types of costs award.

Justice Lane explained that the issue of the court using its inherent power to control its own process in which punishment is an objective is wholly separate:

> When dealing with objectionable conduct of counsel, the court may be exercising its disciplinary jurisdiction based on the contempt power or its inherent jurisdiction to control its own process and officers. If there is to be a finding of contempt, there must be more than simple negligence involved; the conduct in question must be egregious or done in bad faith, or similarly deserving of punishment. The appropriate reaction to contempt is punishment, which will rarely include costs other than those of the contempt proceeding itself, or costs actually wasted by the contemptuous conduct itself. Contempt is generally punished by a fine, not by costs. This is to be contrasted with the inherent power to control misconduct falling short of contempt by the imposition of a costs order to secure the compensation of the opposite party where the misconduct has wasted costs or caused expense to be incurred unnecessarily and in bad faith: *Young*, supra. [Footnote omitted].[53]

Contemptuous conduct is deserving of punishment. On a spectrum of lawyer misconduct it is the most extreme form of misconduct. But as noted by Justice Lane, a personal costs order even under the court's inherent jurisdiction is for the purpose of securing compensation for wasted costs or for causing the other side to incur unnecessary costs. Courts should be cautious when distinguishing between awarding costs personally against counsel for professional misconduct as opposed to conduct which creates unnecessary costs because advocacy requires lawyers to be resolute.

If courts too easily give in to a party's complaint that the lawyer on the other side committed procedural misconduct, where in reality the lawyer only provided zealous representation, then litigants will become tactically emboldened to raise these arguments in order to place a zealous lawyer "...squarely in [a] conflict of duties between his [or her] client and his [or her] pocketbook."[54] A direct implication of this concern in practice may result in lawyers "quieting their concerns about inappropriate conduct of opposing counsel, particularly when that conduct bears some relevance to an issue before the court."[55] When there is no connection between the impugned remarks and any wasted costs, imposing sanctions on lawyers personally may draw the line too far.[56]

53. *Ibid,* at paras 20-21.
54. *Carleton v. Beaverton Hotel*, *supra* note 30 at para. 26.
55. *Ibid.*

While being singularly devoted to their client's cause, advocates are at the same time required to be objective. The impact of personal costs awards against lawyers is to immediately bring the lawyer very much into the proceeding. The lawyer very much enters the fray of the dispute.

In fact, rule 57.07(2) specifically entitles a lawyer with the right to make representations on their own behalf whenever the court is considering making such an order be it on the instigation of the opposing party or on its own initiative. The fact that the lawyer is now themselves entitled to a lawyer in such a situation underlines the inherent conflict that such an order places the lawyer in with their own client. The remedy must be connected to behaviour and conduct of the lawyer that went beyond mere representation of a client and strayed into that area where the lawyer themselves has become an effective party in the litigation who has caused costs to be unnecessarily incurred.

Personal Cost Awards In Family Law

The frequency of seeking or making personal cost awards in family law cases also appears to be increasing. Family law litigation can be extremely acrimonious and emotional with warring spouses seeking to do whatever possible to, among other things, either obtain the maximum support or equalization award or to minimize a support or equalization award. In these cases, lawyers can, unfortunately, get immersed in their client's case and take positions which potentially runs afoul of rule 24(9)(e) of the *Family Law Rules*.

The test articulated in *Galanov* applies to rule 24(9)(e) and therefore even though a lawyer may simply be carrying out the instructions of his or her client in good faith and act without gross negligence, the lawyer can be held personally responsible for costs.

In *Haroon v. Sheikh,*[57] the Court ordered the respondent's lawyer to personally pay $6,500 in costs where he was alleged to have assisted his client in avoiding certain obligations to the court, which were found to have increased costs. Justice Shore found that, among other things, the lawyer had given a tenuous legal opinion on the validity of a foreign divorce, that he had removed the designation of a matrimonial home from a Toronto property in a clandestine

56. *Ibid.*
57. 2020 ONSC 1284, 316 A.C.W.S. (3d) 305, 2020 CarswellOnt 3395 (Ont. S.C.J.), leave to appeal refused *Haroon v. Sheikh (Maltz)*, 2020 ONSC 5762, 2020 CarswellOnt 13676 (Ont. Div. Ct.).

manner, and written a misleading letter to the other side. Justice Shore found that the lawyer's conduct was not a case of the lawyer vigorously putting his client's case before the court.

Leave to appeal Justice Shore's decision was not granted.

However, while rule 24(9) speaks only to "wasted costs", it is headed "costs caused by fault of lawyer or agent". According to the court in *Ben-Lolo v. Wang,*[58] this heading requires an element of default before costs can be ordered against the lawyer under the rule.[59]

In the recent case of *Dunn v. Bors*,[60] the court refused to make a personal costs order against a lawyer where the lawyer acted with poor judgment in advising a client to not follow a court order. In this case, a mother breached a court order when she failed to return the parties' son to his father at the commencement of the father's parenting time. In making her decision, the mother relied on her lawyer's advice. In addition, the lawyer admitted to giving his client advice to refuse telephone parenting time even though telephone parenting time was also included in a court order.

The mother's refusal to return the parties' son to the father caused the father to commence an urgent motion. Although the court found that the lawyer had failed in his duty to the court and put his client at serious risk of being in contempt of a court order, and that the first part of the test articulated in *Galganov* was satisfied because the lawyer had increased the father's legal costs, the court did not order costs personally against the lawyer because there was no element of *mala fides*.[61]

The court stated as follows:

> Although the case law seems to indicate that bad faith behaviour is not necessary to make an order for costs against counsel, the cases do indicate that there has to be some element of *mala fides* for costs to be awarded against counsel. There has to be some intentional breach of the solicitor's duties to the client and the courts rather than inadvertence or incompetence. [The lawyer] simply seemed to be unaware of his obligations and exercised poor judgment. As noted, he is a recent call and I could not find dishonest or unethical intent in his actions. Because of this, I decline to award costs against [the lawyer].

This decision is consistent with the high threshold the courts established under their inherent jurisdiction and with the Supreme Court of Canada's view that bad faith is an element that the court

58. 2012 ONSC 453, 24 C.P.C. (7th) 399, 2012 CarswellOnt 1085 (Ont. Div. Ct.).
59. *Ibid,* at para. 25.
60. 2022 ONSC 2041, 2022 A.C.W.S. 2941, 2022 CarswellOnt 4353 (Ont. S.C.J.).
61. *Ibid,* at para. 19.

must take into account before ordering costs personally against a lawyer.

Under the two-step test approved by the Ontario Court of Appeal in *Galganov*, it is appropriate for the court to consider and require that the lawyer must be found to have acted in bad faith or with *mala fides* before making a personal costs order against him or her, otherwise the high threshold originally established in the jurisprudence and the warning that a personal costs order against a lawyer should only be granted sparingly and with "extreme caution" risks becoming, as suggested above, subject to tactical arguments made by a party or a party's lawyer to derail confident, strong and zealous advocacy from the opponent's lawyer. In this regard, the statutory rule should more closely reflect the threshold established by the court using its inherent jurisdiction when considering if costs should be awarded personally against a lawyer.

Procedural Safeguards

A lawyer who may potentially be subject to a personal costs award is protected by a procedural safeguard which requires that the lawyer first be put on notice that such an order might be sought. The lawyer is entitled to know the allegations that will be made against him or her and is entitled to retain counsel, make separate submissions on the costs sought, and adduce relevant evidence. More specifically, the notice must contain sufficient information about the alleged facts and the nature of the evidence in support of those facts and must be sent far enough in advance of a hearing to enable the lawyer to prepare a response.[62]

In the criminal law context, it is the court that is "responsible for determining whether such a costs sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice."[63] Accordingly, Crown counsel must not become the prosecutor of the defence lawyer, but rather must confine itself to its role as a prosecutor of the accused person.[64]

Although it is important that this process be flexible in order to enable the courts to adapt to the specific circumstances of each case, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been determined on its merits.[65]

62. *Ibid,* at paras. 35-36.
63. *Jodoin*, *supra* note 7 at para. 36.
64. *Ibid,* at para. 38.
65. *Ibid,* at para. 36.

The procedural safeguards highlight the key philosophical issue that underlies the inherent tension in the ability of the court to award such a personal sanction. The lawyer is, by definition, only an effective advocate when they are objective and detached from the matter. The rule effectively converts the advocate into a party from whom a remedy may be exacted. If a court is considering a personal remedy against the lawyer then the lawyer has truly entered the fray and is entitled to all of the procedural safeguards to which parties themselves are entitled, including to retain counsel and make submissions.

In *Blake v. Blake*[66], the Divisional Court of Ontario reinforced the fundamental principle of procedural fairness requiring that a lawyer receive notice and a reasonable opportunity to be heard prior to sanctioning the lawyer's conduct. In this case, the motion judge considered the lawyer's conduct and found that the lawyer had breached his duty to the court by intentionally failing to bring a leading authority to the court's attention regarding the limitation period issue.[67] In particular, the motion judge found that the lawyer's conduct resulted in "some very serious concerns regarding counsel's understanding and recognition of his duty as an officer of the court and his duty of candour with counsel opposite."[68] As a result, the motion judge awarded substantial indemnity costs against the lawyer's client in the sum of $91,65.13.[69] The motion judge did not award costs against the lawyer personally.

In its examination of the motion judge's comments about the lawyer, the Divisional Court noted that while rule 57.07 was not engaged directly by the facts of this case, the requirement imbedded in rule 57.07 to "provide a lawyer with notice of the court's intention to award costs against a lawyer should help inform the obligation to similarly provide a lawyer with notice where a finding of professional misconduct may have negative consequences for that lawyer's client."[70]

The Divisional Court explained that to sanction the conduct of a lawyer without notice and without an opportunity to make submissions with respect to costs places the court in the position of making such public findings that could have a long-lasting impact on a lawyer's reputation.

66. 2021 ONSC 7189, 75 E.T.R. (4th) 98, 342 A.C.W.S. (3d) 44 (Ont. Div. Ct.).
67. *Ibid,* at paras. 55-56.
68. *Ibid,* at para. 62.
69. *Ibid,* at para. 9.
70. *Ibid,* at para. 61.

In the result, the Divisional Court affirmed the principle of procedural fairness, stating as follows:

> Where a motion judge or trial judge intends to call into question the integrity of a lawyer with a finding that the lawyer has breached his or her duty to the court, there is a corresponding obligation on the court to provide that lawyer with notice and an opportunity to be heard. This is a rule of fairness. A lawyer's reputation is something built on years of hard work. A lawyer's reputation can be lost in mere seconds when someone reads a judge's reasons that call into question that lawyer's integrity. We therefore allow the appeal on the basis of a breach of procedural fairness.[71]

This principle has been repeatedly stated by appellate courts. Recently, the Court of Appeal considered the issue in *Leaf Homes Ltd. v. Khan*.[72] The Court of Appeal stressed the requirement of providing the lawyer with the basic right stating:

> The language of r. 57.07(2) is mandatory: no personal costs order shall be made unless the lawyer is first given a reasonable opportunity to make representations to the court. Because the motion judge did not give Mr. Farooq such an opportunity, she did not have the right or power to make the Personal Costs Order.

The Court of Appeal held that regardless of the conduct in issue, on this basis alone the personal costs order had to be set aside.

At a hearing to determine if a personal costs order should made against a lawyer, counsel representing the lawyer against whom the order is sought has the opportunity to contend that the court must proceed with extreme caution, that the order should only be sparingly granted, and, more importantly, that a high threshold applies and that an order should not be made unless there is evidence that the lawyer acted with *mala fides*, in bad faith or dishonestly.

Conclusion

The test used to determine whether a lawyer should be made personally responsible for costs incurred in a proceeding is, as with most costs awards, largely a matter of discretion. While the exercise of the discretion under the court's inherent jurisdiction and common law was intended to be subject to an extremely high threshold, the statutory rules have been interpreted in a manner that has lowered that threshold. Indeed, the history of the rule's development shows

71. *Ibid,* at para. 65.
72. 2022 ONCA 504, 2022 CarswellOnt 9073 (Ont. C.A.), additional reasons 2022 ONCA 547, 2022 CarswellOnt 10088 (Ont. C.A.).

that there is a tension between setting the standard for a costs order too high, based on a bad faith requirement, which would only make the rule available in egregious cases of lawyer misconduct and setting the standard too low, which would make the rule under-inclusive and therefore a limitation on legal advocacy.[73]

However, the tension which has been created by the language of the statutory rules, which do not include an element of bad faith or *mala fides*, can be lessened to ensure that confident, strong and zealous litigators who are engaged to fully represent their clients' interests carry out their duties without fear that their advocacy will be subject to a potential personal costs award by including the need for *mala fides* under the second step of the test established in *Galganov*. This is not unreasonable and would follow the precedent established by the Supreme Court of Canada and the case law which duly notes time and again that a personal costs award against a lawyer should only be made in serious and egregious cases.

Although blatant misconduct on part of lawyers should not be ignored as such conduct would put into question the integrity of both the profession and the administration of justice into disrepute, courts must exercise restraint in making personal cost awards against lawyers because doing so raises unnecessary fear among the Bar that courts will too easily interfere in the lawyers' duties to clients and their duties to a court. A lawyer should not fear being placed in a conflict of interest with their client merely because he or she zealously advocates on their behalf and takes positions based on his or her client's instructions.

73. *Supra* note 4.