

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF SECTION 60 OF THE TRUSTEE ACT, RSO, 1990, C. T.23,
AS AMENDED, AND RULE 10 OF THE ONTARIO RULES OF CIVIL
PROCEDURE, R.R.O. 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF
ADELAIDE STREET LOFTS INC.

COSTS SUBMISSIONS OF 263 HOLDINGS INC.

(Motion Re. Distribution of Sale Proceeds)

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Representative Counsel for the Investors

Overview

1. 263 Holdings Inc. (“263”) seeks **\$70,522.74** in costs for this motion (all-inclusive).¹ 263 was entirely successful and there is no reason to deviate from the typical rule that costs follow the event.² The amount sought by 263 is fair and reasonable for three reasons:

- (a) ***263 conducted this motion in a highly efficient manner:*** \$70,522.74 is less than 8% of the amount at issue (\$914,743.40). The proportion of time and money spent is reasonable given the volume of material on this motion, the complexity of the motion, and the amount at issue.
- (b) ***The amount sought is within what the Respondent reasonably expected to pay:*** 263’s actual costs of \$70,522.74 is nearly 40% less than the \$106,543.30 spent by the Respondent (according to their Costs Outline), and nearly identical to Respondent’s partial indemnity figure (\$69,214.70).
- (c) ***The Respondent’s Conduct Justifies an Elevated Costs Award:*** The Respondent made unfounded, unsupported, and ultimately unsuccessful allegations of bad faith against 263 and Adelaide. Courts have repeatedly held that this justifies a higher cost award for the successful party.

263 Conducted the Motion Efficiently and the Amount Sought is Reasonable

2. The “overriding principle” in assessing costs is reasonableness.³ A costs award of \$70,522.74 satisfies this principle.

3. The stakes of the motion were high for 263: at issue was \$914,743.40 – more than 25% of the amount that 263 expected to receive under the Minutes of Settlement. Yet 263 litigated this motion in a highly efficient manner. 263 prepared a 442 page motion record setting out in detail the commercial context and factual matrix giving rise to the Minutes of Settlement, prepared for cross-examinations, considered and answered numerous

¹ Please see the enclosed Costs Outline of 263.

² *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia (Trustees of)*, [2015 ONCA 732](#), at para. 12.

³ *Boucher v. Public Accountants Council (Ontario)* (2004), [71 O.R. \(3d\) 291 \(C.A.\)](#), at para. 26.

undertakings and under advisements, and prepared a factum and submissions for the motion – all for significantly less than Representative Counsel spent on roughly the same amount of work.

4. 263 achieved this efficiency by delegating the work to the least expensive lawyer who could properly perform these tasks. The vast majority was done by a 2014 call (60 hours), with minimal oversight (3 hours) from a senior partner. All materials were prepared, reviewed, and filed electronically so that there were no disbursements. Counsel for 263 brought a junior lawyer (Ms. Chan) to help prepare for the motion, but appropriately limited her involvement (5 hours total) so as to avoid duplication.

5. In the result, 263 incurred total costs of \$70,522.74 – less than 8% of the total amount at issue. By any measure, this is a reasonable amount in the circumstances.

The Amount Claimed is Within the Amount the Respondent Expected to Pay

6. In *Boucher v. Public Accountants Council for the Province of Ontario*, the Court of Appeal has held that the objective of a costs award “is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigation.”⁴

7. A costs award of \$70,522.74 satisfies this principle. 263’s actual costs are nearly 40% less than the \$106,543.30 spent by Representative Counsel. 263’s actual costs are also virtually identical to Representative Counsel’s partial indemnity number of \$69,214.70, even though the billing rates for counsel for 263 are significantly higher than

⁴ *Boucher v. Public Accountants Council (Ontario)* (2004), [71 O.R. \(3d\) 291 \(C.A.\)](#), at para. 26.

the billing rates of Representative Counsel, and Representative Counsel did not have to prepare the kind of voluminous evidentiary record that 263 had to prepare for this motion.

8. Representative Counsel may argue that 263 should not be entitled to receive its actual costs on the motion, but 263 should not be penalized for litigating this matter efficiently. Had Representative Counsel been successful on this motion, based on its cost outline, it would have sought at least its partial indemnity figure of \$69,214.70. There is no reason why 263 should not be entitled to a similar amount because it conducted this litigation more efficiently and incurred less costs.

9. In *Sienna v. State Farm*, the court awarded the successful party actual costs on a motion where the bill was fair and reasonable and the amount sought was within what the other party would have expected to pay.⁵ The same rationale should apply in this case.

The Respondent's Allegations of Bad Faith Carry Cost Consequences

10. Finally, 263 is entitled to elevated costs in light of Representative Counsel's conduct on this motion.

11. As this court held in its Reasons for Decision, in the months leading up to the Minutes 263 repeatedly told Representative Counsel that property taxes had fallen into arrears. Yet on the closing date, Representative Counsel wrote to counsel for 263 to demand payment of the tax arrears and petitioned Justice Hainey to freeze the funds on the basis that it did not know that taxes had been accruing.⁶

12. In its letter to 263 on the closing date, Representative Counsel wrote: "Pursuant to section 4 of the Minutes, Adelaide had an obligation to pay the operating expenses in

⁵ *Sienna v. State Farm*, [2015 ONSC 786](#), at para. 30.

⁶ Motion Record of 263, Tab 2N, at p. 443.

respect of the Property. In our view, this included the obligation to pay municipal property taxes.”⁷ Representative Counsel made no mention of the operative language of section 4, which states that Adelaide shall “continue to pay the operating expenses in respect of the Property that it is paying as at the date of execution of these Minutes of Settlement, *and will not be liable or responsible for any other expenses in respect of the Property*” (emphasis added).

13. In the result, the funds were frozen and 263 did not have access to over \$900,000 for more than six months, from November 2020 to May 2021.

14. Then, in its factum on the motion, Representative Counsel alleged that 263 breached its duty of good faith by deliberately failing to advise Representative Counsel that property taxes were in arrears and were accumulating up to the closing date. However, Representative Counsel did not adduce *any* evidence on the motion – not one email, document, or discussion – showing that 263 deliberately mislead anyone about the tax arrears.

15. To the contrary, the evidence clearly showed that Representative Counsel had been repeatedly told that property taxes were in arrears in the months leading up to the Minutes. This evidence was accepted by the Court, which found that that the property tax arrears was “plainly disclosed... on multiple occasions to all parties including Representative Counsel and Investors”.⁸

16. Courts have recognized that “[p]roceedings where allegations of fraud, dishonesty or bad faith are made and not established are recognized as falling into the ‘special and

⁷ Motion Record of 263, Tab 2N, at p. 443.

⁸ Reasons for Decision, at para. 3.

rare' category of cases that may attract an award of costs on a substantial indemnity basis".⁹ As the Court held in *Sagan v. Dominion of Canada General Insurance Company*:

The jurisprudence has held that substantial indemnity costs may be appropriate where a party makes empty bad faith allegations. The purpose of this consequence is to diminish frivolous and speculative litigation, to cause litigants to focus on the real issues, and to foster sober reflection above that of an emotional response.¹⁰

17. This was a case of contractual interpretation; there was no basis for any bad faith allegations against either party, particularly unsupported allegations. 263 is entitled to its actual costs of \$70,522.74 based solely on the first two reasons set out above. However, Representative Counsel's "empty bad faith allegation", in the face of clear evidence that it was told of the tax arrears, provides further justification for the amount claimed.

Conclusion

18. For the reasons set out above, 263 asks this court to award it costs for the motion in the amount of \$70,522.74.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of May, 2021.



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⁹ *Sienna v. State Farm Mutual Automobile Insurance Co.*, [2015 ONSC 786](#), at para. 20;

¹⁰ *Sagan v. Dominion of Canada General Insurance Co.*, [2014 ONSC 2245](#), at para. 3.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Boucher v. Public Accountants Council (Ontario)* (2004), [71 O.R. \(3d\) 291 \(C.A.\)](#)
2. *Sagan v. Dominion of Canada General Insurance Co.*, [2014 ONSC 2245](#)
3. *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia (Trustees of)*, [2015 ONCA 732](#)
4. *Sienna v. State Farm Mutual Automobile Insurance Co.*, [2015 ONSC 786](#)
5. *St. Jean (Litigation Guardian of) v. Cheung*, [2009 ONCA 9](#)

**SCHEDULE “B”
LEGISLATIVE PROVISIONS**

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

**IN THE MATTER OF HI-RISE CAPTIAL LTD.
and
IN THE MATTER OF ADELAIDE STREET LOFTS INC.**

Court File No.: CV-19-616261-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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