



Case Comment: *Smith Estate v. Rotstein* – Costs at the Court of Appeal

By *Kaylie Handler**

Introduction

Most readers will undoubtedly recall the decision of The Honourable Mr. Justice D.M. Brown in *Smith Estate v. Rotstein*¹. Briefly, Nancy-Gay Rotstein challenged the validity of her mother's 1987 Will and codicils on the basis of lack of testamentary capacity, lack of knowledge and approval, and undue influence by Lawrence Smith, her brother and the executor. Mr. Smith moved for partial summary judgment to dismiss the objections to the 1987 Will and the first two codicils. Brown J. granted partial summary judgment dismissing the Notice of Objection of Ms. Rotstein with respect to her mother's will, and the first two codicils, and ordered that a Certificate of Appointment of Estate Trustee be issued with respect to the will and the first two codicils; the validity of the two later codicils was left to be determined. This decision was appealed and upheld by the Ontario Court of Appeal (the "OCA").²

Costs of the Motion before Brown J.

With respect to costs of the summary judgment motion, Brown J. ordered Ms. Rotstein to personally pay the moving party's (i.e. her brother's) full indemnity costs fixed in the amount of \$707,173.00 for fees and \$30,407.29 for disbursements, together with applicable taxes on both amounts.³ Ms. Rotstein appealed the costs decision to the OCA. The OCA found that, although Brown J.'s award of full indemnity costs was justified, his failure to consider Ms. Rotstein's cost submissions and critique of Mr. Smith's bill of costs because she did not file her own bill of costs, was a reversible error. As such, the OCA sent the issue of the quantum of costs awarded back to Justice Brown for reassessment.⁴

Costs of the Appeals

The OCA has now released the endorsement with respect to the costs of the appeals.⁵ In light of the attention paid to the *Smith Estate* saga by the trusts and estates bar, it seems fitting to provide readers with synopsis of the OCA's endorsement on costs of the appeals.

¹ 2010 ONSC 2117

² 2011 ONCA 491; leave to appeal to the Supreme Court of Canada has been sought.

³ 2010 ONSC 4487

⁴ *Supra*, note 2, at paragraph 56.

⁵ 2011 ONCA 833. The OCA was of the opinion that the appeal of Brown J.'s decision on the merits and the appeal of Brown J.'s decision on costs of the summary judgment motion were separate appeals, although this was not determinative.

With respect to the appeal on the merits, the respondent, Mr. Smith, sought full indemnity costs or substantial indemnity costs from Ms. Rotstein on the basis that the appeal was a continuation of the “reprehensible”, “harassing”, and “meritless” will challenge.⁶ In the event that the OCA was not prepared to award him full indemnity or substantial indemnity costs, the respondent submitted, *inter alia*, that under Rule 49 the Court should consider the cost consequences of Ms. Rotstein’s failure to accept his offer to settle, which remained open until the commencement of argument.

With respect to the appeal of Brown J.’s cost decision, Mr. Smith argued that success was divided and, as such, each party should bear his or her own costs.⁷

The appellant, Ms. Rotstein, argued, *inter alia*, that in light of the divided success on the appeal, each party should bear his or her own costs.⁸

The OCA held that the appeal on the merits did not warrant an award of either full indemnity or substantial indemnity costs, as the argument advanced by the appellant was on a narrow question of law: the application of the General Rule of Probate Law, which is said to require that all testamentary documents be probated at the same time.⁹ In considering Mr. Smith’s offer to settle the appeal, the Court held that Rule 49 does not apply to appeals, and although the OCA has the power to take into account an offer to settle an appeal when fixing costs, this power is only exercised on rare occasions.¹⁰

With respect to the costs appeal, the Court held that the order for a reassessment by the motions of judge was a significant victory for the appellant.¹¹

In the result, the Court held that the respondent was entitled to his partial indemnity costs with respect to the appeal on the merits, and the appellant was entitled to her partial indemnity costs with respect to the costs appeal.¹² Interestingly, in considering the quantum of costs, the Court applied a discount in the amount of \$5,000.00 to the respondent’s bill, having regard to the “excessive” attention paid to reviewing facts, notably the appellant’s conduct, which was not in issue on the appeal.¹³

The *Smith Estate* saga continues. Ms. Rotstein has sought leave to appeal to the Supreme Court of Canada.

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⁶ *Ibid* at paragraph 7.

⁷ *Ibid* at paragraph 8 and 9.

⁸ *Ibid* at paragraph 10.

⁹⁹ *Ibid* at paragraph 15.

¹⁰ *Ibid* at paragraph 16.

¹¹ *Ibid* at paragraph 17.

¹² *Ibid* at paragraph 18.

¹³ *Ibid* at paragraph 19.