



## MUNICIPALITY PAYS EXTRA COSTS FOR HARD-NOSED TACTICS AND FAILURE TO SETTLE

### **Court Deals with “Pugnacity” in Litigation**

Disputes, quarrels and court battles can push people into taking emotional and unreasonable positions. To help you avoid such extremes, here is a cautionary tale for contract managers and senior executives who get involved in serious litigation. The legal case does not deal with a contract dispute, but it does demonstrate what can happen when feelings of anger, embarrassment, or frustration push a team into hard-nosed negotiations and a win-lose competitive attitude to disputes.

In *Kinloch (an infant) v. Edmonds, Boudreau, O’Neill, Asmussen and The City of Victoria*, [2008] B.C.J. No. 2385, the female plaintiff (age 14 at the time) sued The City of Victoria and the four personal defendants, claiming that two police officers had used excessive force and violated her rights. A civil jury agreed and awarded her \$60,000 in damages.

Willow Kinloch had been intoxicated in a public place, was arrested by the Victoria police and lodged in the police cells. Some hours later, it was decided that she was fit to be released. She was taken to her home by the two defendant officers. They were unable to gain entry to the apartment where she lived, so they returned her to the police lockup. Unhappy with that, Kinloch kicked off one of her shoes, which struck a custodial guard. The defendant officers then physically took her to the ground and applied a restraining tether. She was left in the cell, tethered, for approximately four hours, and then released. The jailhouse events were captured on videotape.

After the jury trial was completed, the B.C. Supreme Court dealt with the award of court costs. At that point, the Judge made critical comments, and there was a much higher financial reckoning for the defendants.

There are four key lessons in what happened.

#### **Understanding Court Costs**

The Canadian court system encourages people to settle their lawsuits. In reality, most contract disputes are resolved after the parties have exchanged documents and provided sworn evidence at examinations for discovery. Court costs are a big motivation for settlement. Normally, the successful party is entitled to recover a portion of his or her legal expenses from the unsuccessful party. So if you push all the way to trial, and then lose, you are faced with a triple defeat: you lost the court battle, you pay your own legal expenses, and you pay a significant part of the other side’s legal costs.

## **Courts Have Discretion to Increase Costs**

In this case, Willow Kinloch received court costs at the highest possible scale. Justice J.W. Williams described a number of positions taken by the defendants as unco-operative and difficult. The Judge noted a refusal to deliver basic information, and a refusal to agree to certain amendments to the lawsuit, even though the amendments would have reduced or limited the City's liability.

Justice Williams said, “[T]his was a case where the police defendants were defended in a way that gave absolutely no quarter ... ” and, “[T]he manner in which the police defendants conducted this action was clearly hard-nosed and that is a factor which can be properly considered by the Court in exercising its discretion with respect to the scale of costs to be applied.”

## **Dealing with Offers of Settlement**

Canadian courts also push parties to resolve disputes by linking settlement offers and court costs. Basically, either side can make a “settlement offer” during a lawsuit. If a reasonable settlement offer is refused, then the court can later use court costs to reward that party for making the offer. There is no legal obligation to make an offer of settlement, nor to reply to an offer of settlement, but there are strong financial motivations.

For example, Willow Kinloch made a settlement offer of \$40,000 plus court costs. The City and the four defendants did not respond. Eventually, the civil jury awarded \$60,000 plus court costs to her. According to the rules of court in B.C., since Willow Kinloch had made a reasonable offer to settle of \$40,000, she would ordinarily receive double court costs. However, in this case, her offer to settle violated certain court rules, and ultimately she did not receive double court costs. As a result of this procedural slip-up, the defendants' liability for court costs was reduced by one half.

## **One Defendant Ordered to Pay for Other Defendants**

A final blow to the City and the two police defendants came with the court costs. Two custodial guards had been joined as defendants in this lawsuit, but they ultimately avoided any liability. However, those two guards applied for payment of their court costs. The Judge said that it was reasonable for the plaintiff to have sued those two defendants. Since she was ultimately successful in the lawsuit, the City of Victoria and the police defendants ended up having to pay for the court costs of their fellow defendants.

## **Conclusion**

Most organizations expect their managers and senior executives to diligently defend lawsuits when they are convinced they are in the right. Similarly, most organizations expect that litigation will be handled with a sense of fiscal responsibility. Managers who use pugnacious, hard-nosed tactics in litigation will likely fail their organizations on both counts.

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