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Offers to Settle and The Public Interest in Charter Litigation: *Stewart v Toronto (Police Services Board)*, 2020 ONCA 460

By: Drew Yewchuk & Sarah Shibley

Case Commented On: *Stewart v Toronto (Police Services Board)*, 2020 ONCA 460 (CanLII)

Stewart v Toronto (Police Services Board), 2020 ONCA 460 (CanLII) is a costs decision that concludes a ten-year legal battle about the power of police to stop and search protestors. Mr. Stewart was successful in obtaining a court decision that the Toronto Police Service (TPS) had violated the *Charter* by searching him without lawful justification and interfering with his freedom of speech. Despite his success, because of the Toronto Police Service's $10,000 settlement offer to Mr. Stewart in 2017 and Ontario's rules for litigation costs and offers to settle, it ultimately cost Mr. Stewart more than $60,000 to successfully enforce his constitutional rights. This post argues that the normal cost rules relating to offers to settle are ill suited to public interest litigation against government bodies.

Background

The background to the case is the 2010 Toronto G20 summit, the associated political protest movements and the "largest ever" Canadian police infiltration and spying network assembled to monitor "criminal extremists." As part of this initiative, the police infiltrated and monitored groups of political dissidents including anarchists, socialists, and environmentalists.

In June of 2010, the TPS established a perimeter around Allan Gardens, a Toronto park, to search protestors for weapons and anything that would help them resist tear gas. Stewart attempted to break through the TPS perimeter around the park to avoid having his bag checked. Upon doing so, he was stopped by the police while his bag was checked and his swimming goggles were removed. Stewart claimed that these actions constituted a breach of his *Charter* rights because the police perimeter around Allan Gardens and inspection of bags and belongings as a condition of entry was not conducted in a lawful manner.

The case ultimately led to four decisions called *Stewart v Toronto (Police Services Board)*: a trial decision (*Stewart Trial*, 2018 ONSC 2785 (CanLII)), a trial-level costs decision (*Stewart Trial Costs*, 2018 ONSC 4970 (CanLII)), an appeal decision (*Stewart Appeal*, 2020 ONCA 255 (CanLII)), and the appeal-level costs decision (*Stewart Appeal Costs*, 2020 ONCA 460 (CanLII)) that is the focus of this post.

The case was not about individual police misconduct. The court found that the individual officers involved had acted with professionalism and good faith (*Stewart Appeal*, 2020 ONCA 255 at

paras 143-149). The issue was the constitutional limits of police powers to contain and deter disruptive political protests (*Stewart Appeal*, 2020 ONCA 255 at paras 138-139).

The Trial Decisions

Mr. Stewart brought a variety of tort and *Charter* claims, including claims the police had interfered with his section 2 right to freedom of expression and his section 8 and 9 rights against unreasonable search and arbitrary detention (*Stewart Trial,* 2018 ONSC 2785 at para 6). At trial, the court found that the police acted within their legal authority based on a justified condition of entry and had not violated Mr. Stewart's rights (*Stewart Trial,* 2018 ONSC 2785 at paras 92-93).

The trial judge was initially inclined not to award costs because the case involved "a matter of public interest and may contribute to an understanding the application of the *Charter*" (*Stewart Trial,* 2018 ONSC 2785 at para 94). However, TPS made submissions seeking a cost award and the Court awarded TPS "a modest cost award" of $25,000 (*Stewart Trial Costs*, 2018 ONSC 4970 at para 6). The Court took into account the plaintiff's claim for $100,000 in damages for breach of his *Charter* rights, and the offers to settle made by TPS to avoid trial.

Court of Appeal

The Court of Appeal overturned the trial judge and found that the police-imposed condition of entry infringed Mr. Stewart's section 2(b) right to freedom of expression as he met the criteria from *Irwin Toy Ltd. v Quebec (Attorney-General,* 1989 CanLII 87, [1989] 1 SCR 927 as modified in *Montreal (City) v 2952-1366 Québec Inc*., 2005 SCC 62 (CanLII): the activity involved expressive conduct, the method or location of expression did not remove its section 2(b) protection, and the purpose or effect of the government action restricted the freedom of expression (*Stewart Appeal*, 2020 ONCA 255 at para 45). In considering whether the violation could be permitted under the *Charter* section 1 "reasonable limit prescribed by law" analysis, the Court of Appeal found that the detention of the appellant, the search of his backpack and the seizure of his goggles were not authorized by law, and so could not be justified under *Charter* section 1 (*Stewart Appeal,* 2020 ONCA 255, at paras 111-119).

The Court of Appeal granted Mr. Stewart damages for the *Charter* violations in the amount of $500 and costs for the appeal in the amount of $20,000. This was significantly less than the partial indemnity costs of $48,000 that were sought by Mr. Stewart (*Stewart Appeal,* 2020 ONCA 255 at paras 153-155) The parties were unable to reach an agreement on costs and made further submissions to the Court of Appeal on the matter. Mr. Stewart sought costs in the amount of $114,584.61 on a substantial indemnity basis (*Stewart Appeal Costs,* 2020 ONCA 460 at paras 1-2), relying on the following arguments for this claim: (at para 3)

(i) his action was public interest litigation that warranted substantial indemnity costs;
(ii) he achieved a result that was more favourable than the offer to settle…pursuant to rule 49 of the Rules of Civil Procedure; and
(iii) the proper application of the r. 57.01 factors should result in an award of substantial indemnity costs.

(Rule 57.01 of *Ontario's Rules of Civil Procedure*, RRO 1990, Reg 194 lists the factors a court may consider in awarding costs.)

The Court did not find his arguments persuasive. It maintained that Mr. Stewart failed to meet the criteria for public interest litigation special costs of a proceeding which requires "truly exceptional" public interests matters and having no personal, proprietary or pecuniary interest in the litigation that would justify it on economic grounds (*Stewart Appeal Costs*, 2020 ONCA 460 at para 6, citing *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) at para 140). Mr. Stewart's matter was simply a matter of public importance rather than a "truly exceptional" matter of public importance. In this regard, the court did not explain why a question about police powers to limit and control civic participation and the right to protest did not have "truly exceptional" status. The Court then went on to reason that the appellant's request for damages failed the "personal, proprietary or pecuniary" aspect of the public interest litigation test because he had sought damages. Of notable importance was the Court's emphasis on Ontario's Civil Procedure rule 49.10(2) (*Stewart*, 2020 ONCA 460 at para 8).

Rule 49.10(2) of Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194 reads:

> (2) Where an offer to settle,
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> > (a) is made by a defendant at least seven days before the commencement of the hearing;
> >
> > (b) is not withdrawn and does not expire before the commencement of the hearing; and
> >
> > (c) is not accepted by the plaintiff, and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

The analogous rule in the *Alberta Rules of Court*, Alta Reg 124/2010 is Rule 4.29. Instead of offering partial indemnity costs, Alberta's Rule 4.29 offers double the costs to which the party would otherwise have been entitled.

Had no offers to settle been made, Stewart would have been presumptively entitled to costs on a partial indemnity basis totalling $87,240.76. However, the TPS had offered to settle twice throughout the proceedings. The TPS's first offer was $5,000 all-inclusive and their second was $10,000, prejudgment interest and partial indemnity costs to the date of the offer (*Stewart Appeal Costs*, 2020 ONCA 460, at para 11). This second offer included an amount of damages greater than the final judgement damages awarded on appeal (as noted above, only $500 was awarded to Mr. Stewart in damages). Civil Procedure Rule 49.10(2) "provides that in such circumstances, the plaintiff, Mr. Stewart, is entitled to partial indemnity costs to the date the offer was served and the defendant, TPS, is entitled to partial indemnity costs from that date 'unless the court orders otherwise'" (*Stewart Appeal Costs*, 2020 ONCA 460 at para 13). The Court noted that

would have probably left Mr. Stewart paying "the TPS about $8,000 to $10,000 in partial indemnity costs" (*Stewart Appeal Costs* , 2020 ONCA 460 at para 15). The Court determined this outcome would have been "a harsh result for a case in which an individual successfully enforced his constitutional rights" and that the "action will contribute to a better understanding of the interplay between *Charter* rights and permissible police crowd control techniques" (at para 19). The Court decided it was in the interests of justice to depart from the cost presumption and awarded Mr. Stewart $25,000 in costs.

When are Settlements in the Public Interest?

The purpose of Ontario's Rule 49.10 and Alberta's Rule 4.29 is to create a costs incentive for parties to accept reasonable settlement offers in order to divert disputes away from the courts. This rationale is compelling in civil disputes between two private parties. It is generally in the public interest to have private disputes resolved quickly and with minimal use of court time.

However, it is harder to see why creating a cost-incentive to settle *Charter* claims against the government out of court is in the public interest. Turning to the courts to have *Charter* rights parsed out and enforced is a crucial function of the judicial branch. Judicial decisions about *Charter* rights determine the scope of *Charter* rights and the limits of government power to infringe on those *Charter* rights. Decisions about *Charter* rights are what keeps the living tree of the Canadian constitution growing. It is far more important to get the court to write decisions defining the limits of police powers than it is for the dispute to be settled quickly. Allowing government to take advantage of the rules of costs presumptions following offers to settle risks allows governments facing *Charter* challenges to offer high settlements to litigants in order to create a heavy costs presumption. This will force litigants to choose between having the Courts make a decision on the scope of their *Charter* rights that may set an important precedent and accept a large cost risk, or abandon their chance to have the courts consider their *Charter* rights in exchange for a cash payout. This approach would dissuade litigants from following through on important *Charter* cases, developing Canadian constitutional law, and generating widespread benefits in the public interest.

The Court in *Stewart* was right to vary from the costs presumption of Ontario's Rule 49.10, but it should have gone even further. In a constitutional rights case, particularly one relating to the constitutional rights of those interacting with police, Rule 49.10(2) should have no application at all. As the Court noted, Mr. Stewart's case "will contribute to a better understanding of the interplay between *Charter* rights and permissible police crowd control techniques." Mr. Stewart may not have deserved $100,000 in damages, but it is difficult to see how he deserved a final legal bill in the $60,000 range.

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