

CITATION: Navaratnarajah v. FSB Group Ltd., 2026 ONSC 3314
COURT FILE NO.: CV-20-00642941-00CP
DATE: 20260617

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SURENDRARAJ NAVARATNARAJAH, Plaintiff

– and –

FSB GROUP LTD., FSB INSURANCE LTD., and FSB COMMERCIAL LTD.,
Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Tim Gleason and Megan Phyper*, for Monkhouse Law Professional Corporation
(non-party)

Richelle Pollard and Stephen Gleave, for the Defendants

HEARD: June 4, 2026

MOTION TO VARY COSTS ORDER

I. The Motion

[1] The Defendants in this failed class action seek to vary the costs Order to make counsel for the class, rather than the representative Plaintiff himself, responsible for payment of their costs.

[2] On August 11, 2021, I certified this employment-related class action: *Navaratnarajah v. FSB Group Ltd.*, 2021 ONSC 5418 (“*Navaratnarajah Certification*”). Nearly two years later, on May 31, 2023, I decertified it: *Navaratnarajah v. FSB Group Ltd.*, 2023 ONSC 2574 (“*Navaratnarajah Decertification*”). The class members had opted out of the action *en masse*, having determined that the claim “is not in their interest and does not do them justice”: *Ibid.*, at para. 37.

[3] On July 6, 2023, I ordered costs in favour of the Defendants in amount of \$100,000: *Navartnarajah v. FSB Group Ltd.*, 2023 ONSC 4024, at para. 24 (“*Navaratnarajah Costs*”).

[4] I assumed at the time, and said as much in my costs ruling, that the representative Plaintiff’s costs would be covered by class counsel, Monkhouse Law Professional Corporation (“Class Counsel”): *Navaratnarajah Costs*, at para. 17. Some arrangement whereby the representative

Plaintiff is relieved of any potential costs burden – either by counsel or by a third party funder under an approved funding agreement – is not only standard procedure in class action litigation, but has become accepted as a necessary ingredient without which, or without some further explanation, the representative Plaintiff will not pass one of the important criteria for certification: *Azar v. Strada Crush Limited*, 2019 ONSC 4436, at paras 17-18.

[5] The Defendants’ costs have not yet been paid. Class Counsel has not paid them and, as far as one can tell by the correspondence between counsel, has not even discussed the matter with their client. The Defendants bring this motion for a declaration that the costs awarded to the Defendants are owed by and are to be paid by Class Counsel, or, alternatively, for an Order varying my costs ruling to be directly against Class Counsel as well as against the Plaintiff.

[6] The motion, in turn, raises three questions: a) am I now *functus officio* and without jurisdiction to decide this motion? and b) if I have jurisdiction over the matter, should Class Counsel in principle be made liable for costs? c) can the costs Order be varied under the *Rules of Civil Procedure*?

II. Background

[7] Much to the Defendants’ surprise, it has now been three years since my costs Order and the costs have not been paid. Class Counsel has all but ignored Defendants’ counsel’s requests for payment. On September 18, 2025, in response to correspondence from Defendants’ counsel inquiring about payment of the costs award, Class Counsel emailed Defendants’ counsel stating that they would “work to convey your messages to my client at the appropriate time.” Defendants’ counsel responded that, “Respectfully...I’m not sure what that means.” Neither am I.

[8] In fact, I would think that it is part of a lawyer’s obligation to the client to promptly transmit important messages like this one seeking payment of costs. I note that Rule 3.2-1, Commentary 6, of the *Rules of Professional Conduct* provides: “Whether or not a specific deadline applies, a lawyer should be prompt in handling a matter, responding to communications and reporting developments to the client.” A demand for a \$100,000 payment awarded against the client seems like a “development” that the client may need to know about sooner rather than later.

[9] In the meantime, the Plaintiff, with the same Class Counsel, sought leave to appeal the costs decision to the Divisional Court. On September 8, 2025, the request for leave was denied: *Navaratnarajah v. FSB Group Ltd.*, 2025 ONSC 4847 (Div. Ct.).

[10] The Plaintiff, still with the same lawyers acting as Class Counsel, then sought leave to appeal to the Court of Appeal the Divisional Court’s denial of leave to appeal. Defendants’ counsel characterizes this as nothing but a delay tactic. I understand why they might say this. In the first place, the Court of Appeal has definitively stated that it will not grant leave to appeal a decision of Divisional Court denying leave to appeal unless that decision was decided on the ground that

the Divisional Court had no jurisdiction, which was not the case here: *BGOI Films Inc. v. 108 Media Corporation*, 2019 ONCA 539, at para. 3.

[11] Moreover, I had already noted in my decertification decision that Class Counsel had continued to delay and increase costs by vigorously pursuing the litigation – including making increasingly far-reaching and pointless demands for production of documents from the Defendants – even after the entire class had evaporated. At that point, 66 out of a total 69 potential class members had opted out, leaving a class composed of only the representative Plaintiff, one deceased class member, and one missing class member who could not be located: *Navaratnarajah Decertification*, at para. 8.

[12] I commented further on this tendency to unnecessarily prolong and inflate the expense of the action in *Navaratnarajah Costs*, at para. 14: “Litigation lawyers must advocate their clients’ rights, but they must equally take care not to allow their zeal for procedure to run unchecked or to be pursued without any realistic goal in sight”. Defendants’ counsel characterize the futile application for leave to appeal a denial of leave to appeal as a repetition of just this sort of excess.

[13] I do not know whether the further attempt at leave to appeal was an intentional delay tactic; but I do know that the Court of Appeal ultimately dismissed the request for leave to appeal the Divisional Court’s decision. Tellingly, the Court of Appeal’s endorsement states, at *Navaratnarajah v. FSB Group Ltd.*, COA-25-OM-0396, 30 Jan. 2026:

It is ordered that this motion be dismissed **for delay** with costs fixed at \$750.00, despite Rule 58.13 [emphasis added].

[14] In other words, what looks like a delay tactic to begin with was itself dismissed for delay. Class Counsel had filed what was really a futile further appeal, and then apparently let it languish. Little wonder that Defendants’ counsel feel like they were being strung along.

[15] On the assumption that the Court of Appeal’s dismissal of the leave application was the end of any possible road in terms of challenging the costs decision, Defendants’ counsel wrote to Class Counsel on February 5, 2026. Their correspondence stated, in effect, that if Class Counsel had been waiting for a time to arrange payment, now seemed to be the time. The email from Defendants’ counsel sets this out with admirable simplicity and restraint:

In view of the attached order dismissing your client’s appeal for delay, I am reaching out in respect of payment of the outstanding cost award.

By our calculation, the post-judgment interest is now \$15,526.35. When this amount, along with the \$750 in costs is added to the \$100,000.00 awarded, the total payable is \$116,276.35.

Please confirm receipt of this email and provide confirmation that payment of the \$116,276.35 will be paid immediately. Once again, I will send our client's EFT information to facilitate the immediate payment.

[16] The response from Class Counsel came by email several days later, on February 9, 2026:

Hello, thank you for your email. We were retained on the merits, and for the appeal until it was dismissed. We are not retained by this client regarding 'collections'.

All the best going forward,...

[17] The rather curt dismissal of Defendants' counsel's request has taken them aback. Prior to the appeal, they had been advised by Class Counsel that the matter of costs would be taken up with the Plaintiff "at the appropriate time". At the end of the appeal process, they were then advised by Class Counsel that they were no longer retained and so the request for payment would not be passed on to the Plaintiff (or addressed in any other way).

[18] Apparently, the "appropriate time" for Class Counsel to communicate with their client had either come and gone in an instant not discernable to the human eye, or it had never materialized at all. In any case, it is now clear that, whether or not there is a costs agreement in place between Class Counsel and the representative Plaintiff, no costs will be paid without considerably more legal process. From Defendants' counsel's point of view, that likely includes a judgment debtor examination of the representative Plaintiff, attempts to execute against his property or bank accounts, garnishment orders, etc.

[19] Following that, if one assumes that Class Counsel will take an approach with their client that mirrors the approach taken with the Defendants, the representative Plaintiff may have to sue Class Counsel in respect of any costs coverage agreement between them.

III. Jurisdiction to make the order requested

[20] Counsel for Class Counsel appearing at this motion submits that, a final costs order having been taken out, I am now *functus* and have no jurisdiction to entertain this motion. They cite the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 27, at para. 33 for the proposition that a matter cannot be revisited once a final judgment or order has been entered:

In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered the decision. A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered. After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to

correct an error in expressing its manifest intention, or where the matter has not been heard on its merits. [Citations omitted]

[21] It is counsel's view that the court's jurisdiction only remains open to answer questions in the judgment that were required to be answered but were somehow omitted. They also concede that it remains open for a court to go back to address some significant point of law or statutory provision that was not drawn to the court's attention and therefore was not considered when it should have been: *McLean v. Carr Estate*, 1996 CanLII 11078, at para. 16 (NL CA).

[22] Class counsel's lawyers go on to submit that the limitations on the court's ability to revisit a finally decided matter applies to costs as well as to decisions on the merits of a case: 677933 *Ontario Ltd. v. Dical Investments Ltd.*, 1992 CarswellOnt 2810, at para. 3 (ON CA). Thus, for example, they point out that once costs are decided and a costs order is issued, the matter cannot be re-opened to award costs against a party's solicitor where that was never requested, and never considered, in the first instance: *Best v. Lancaster*, 2015 ONSC 6279, at para. 42.

[23] As the lawyers for Class Counsel describe it, once costs have been decided "[t]he court's intention has been made clear and the matter is *res judicata*...[and] any residual powers that this court may have to vary these orders are now extinguished and the court is *functus officio*": *Dical Investments, supra*, at para. 2. This, combined with the doctrine of abuse of process, prevents re-litigation "in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as...finality and the integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77, at para. 37.

[24] On the other hand, the bright line rule described by Class Counsel's lawyers is not always so bright or so linear. In fact, the Newfoundland Court of Appeal in *McLean, supra*, at para. 16, suggested that determination of the functus status of a judge in an action is often a matter of context and debate:

Determining whether a judge is *functus officio* involves...drawing a line between an omission by the trial judge – a failure to do something which should have been done – and the discharge of the duty but failing to consider some argument had someone, whether counsel or judge, thought about it might have had an impact on the result. The line is not easily drawn.

[25] The question of whether as the motion court judge I am *functus* is not, therefore, a mechanical one that is answered automatically as soon as a formal order is taken out. Rather, the full context of the costs ruling has to be considered. The challenge is how to characterize the fact that in my costs ruling I did not award costs against Class Counsel in the first place. To put it another way, has "new and critical evidence [been] discovered that could not have been known without due diligence"? *Hart v. Balice*, 2022 ONCA 787, at para. 8.

IV. Class Counsel's retainer

[26] In awarding costs to the Defendants, I took it for granted that the representative Plaintiff, with experienced Class Counsel, would not have been put in the position of commencing an action on behalf of a large class of claimants without some provision covering the potential liability for costs. As former Chief Justice Warren Winkler and now Justice Sharon D. Matthews stated in their essay *Caught In a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings*, Court of Appeal for Ontario archives, <ontariocourts.ca/coa/about-the-court/archives/caught/#_ftn2>, "...the practical reality is that a representative plaintiff, who often has only a small monetary claim in the case, will not or should not agree to expose him or herself to a costs order that may be many, many times what he or she has at stake in the litigation."

[27] I had initially certified this action and approved the suitability of the representative Plaintiff: *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, at paras. 32-33. The Notice of Certification in this action indicates that, in accordance with what has become standard procedure in Ontario class actions, responsibility for costs is not of any concern to the class members:

Fees and Disbursements

You do not need to pay any legal fees out of your own pocket. A retainer agreement has been entered into between the representative Plaintiff and Monkhouse Law with respect to legal fees. The agreement provides that the law firm has been retained on a contingency basis, whereby it will only be paid its fees in the event of a successful result in the litigation or a Court approved settlement. The fees paid to the lawyers for the class will be paid out of any judgment and will not be paid directly by class members. Any fee paid to the lawyers for the class is subject to the Court's approval.

You will not be responsible for FSB's legal costs if the class action is unsuccessful.

[28] In any ordinary understanding of this advisory, the comfort given to class members would include the representative Plaintiff himself. In fact, based on submissions made by Class Counsel in the certification motion, I had concluded that the representative Plaintiff was... "[i]n all relevant respects...in no different position than all of the others in the proposed class and appears adequate to the task at hand": *Ibid.*, at para. 33.

[29] In *Navatarajah Costs*, at paras. 15-18, I further elaborated at some length on my expectations regarding the responsibility for payment of costs:

[15] Finally, I feel compelled to comment on class counsel's submission that, "The Defendant's actions worked to eliminate the class action, but should not result in financial disaster for the Plaintiff." In the first place, it was the actions of the

putative class members in opting out *en masse*, and not anything done by the Defendants, that caused this class action to come to an abrupt halt.

[16] More importantly, it would be very surprising to find that the Plaintiff had to personally bear any costs. In my original certification decision, at para 32, I found that the Plaintiff was adequate to the task of being a representative Plaintiff for a class action. It did not occur to me to investigate the details of his counsel's retainer agreement to ensure that it contained the standard indemnity for costs, as that is so accepted as standard that it is not typically part of the inquiry into the appointment of class counsel: see *MacBrayne v. LifeLabs Inc.*, 2020 ONSC 2674, at para 9.

[17] On the rare occasion when courts have been alerted to this kind of gap in the retainer agreement, they have opined that an indemnification against an adverse costs award is expected of class counsel. Without an indemnity clause, class counsel may not be in a position to play that role at all: *Azar v. Strada Crush Limited*, 2019 ONSC 4436, at paras 17-18.

[18] At the very least, a prospective representative plaintiff must be advised with respect to the potential for costs and the availability (or otherwise) of an indemnity agreement. If not, counsel has not fulfilled their duty to the client. In any case, whatever the situation is here, it is certain that the Defendants should not have to bear the price of alleviating the Plaintiff or his counsel of this burden.

[30] The expectation that counsel for a representative plaintiff and class will be responsible for costs awarded to a defendant is “now part of the landscape in class proceedings”: *Holmes v. London Life Insurance Co.*, 2007 CanLII 92625, at para. 2 (SCJ). In fact, “it is almost unheard of in class proceedings in this jurisdiction for there to be no agreement, or understanding, between plaintiffs and class counsel in respect of the payment of costs if the action is unsuccessful”: *Drady v. Canada (Attorney General)*, 2008 CanLII 1945, at para.57.

[31] As Justice Glustein observed with respect to the very same Class Counsel as in the present case, “It is improper for the class counsel to suggest that the proposed representative Plaintiff may be exposed to the significant cost consequences of an unsuccessful certification motion... If counsel cannot obtain funding and is not prepared to indemnify the representative plaintiff in the retainer, I question whether counsel can be permitted to act as class counsel”: *Davidson v. T.E.S. Contract Services*, 2024 ONSC 4362, at paras. 25-26. A representative Plaintiff may not be left “without an indemnity undertaking”, such that it is “open for [Class Counsel] to obtain extremely large fees arising from a successful outcome without any concomitant risk of adverse costs consequences”: *Poulin v. Ford Motor Company of Canada Limited*, 2007 CanLII 56490, at para. 70.

[32] In an email dated February 10, 2026, after being told by Class Counsel that they were not retained by the Plaintiff for “collections”, Defendants’ counsel followed Class Counsel as follows:

Please confirm whether there is an indemnification provision in your retainer agreement with the representative Plaintiff. As you may recall from the costs endorsement on this matter, Justice Morgan set out his expectation, in line with the ordinary and expected practices of class counsel in these types of proceedings, that an indemnification with respect to costs be given.

[33] Class counsel responded by email the next morning, indicating that, “We are unable to share solicitor client privilege documents. I assume the same is true of your own retainer.”

[34] The parallel drawn by Class Counsel between the representative Plaintiff’s retainer agreement and the Defendants’ retainer agreement with their counsel is off base. The Defendants’ retainer agreement is no one’s business but their own. A representative Plaintiff’s retainer is the business of the class, and is to be disclosed in the interests of the class of which the Court is the guardian.

[35] Perhaps more importantly, Class Counsel’s response was unresponsive. Defendants’ counsel had not asked for production of a privileged document. Rather, they merely sought confirmation that my statement in the costs endorsement was correct – i.e. confirmation of a state of affairs that is not itself confidential and that, as the case law demonstrates, is a requirement for Class Counsel to disclose in a class proceeding.

[36] I will also add that it is not at all clear – in fact, it seems doubtful – that Class Counsel sought instructions from the representative Plaintiff with respect to this question.

[37] It is a matter of first principles that if this one term of the retainer agreement is privileged (which, as I indicated, it is generally considered not to be), the privilege is that of the client alone: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263, at para. 31. Class Counsel cannot decide on their own whether to withhold the information from the retainer agreement without instructions from the client. Justice McLachlin (as she then was) explained in *S. & K. Processors Ltd v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407, at para. 6 (BC SC), that those instructions would have to entail the client “(1) know[ing] of the existence of the privilege; and (2) voluntarily evince[ing] an intention to waive that privilege.” The discussion with the client, in other words, would have to thoroughly canvass the context and implications of the request.

[38] Given that Class Counsel had previously indicated a lack of communication with the representative Plaintiff regarding the demand for payment by the Defendants, one might surmise that there was likewise no overnight discussion of the retainer information request. More to the point, it seems highly unlikely that the representative Plaintiff would invoke any privilege over the question of whether Class Counsel was obliged to cover the costs payments.

[39] If there was such a clause in the retainer agreement – which the original Notice of Certification suggested and which standard class action practice demands – and if the representative Plaintiff were properly and thoroughly advised, it would be in his interest to let the Court and the Defendants know about it so that enforcement could be directed to Class Counsel rather than to him. And if there were no clause covering the question of costs in the retainer agreement, the representative Plaintiff should have been advised by Class Counsel that this was highly unusual and that the courts have considered it improper, in which case it would again be in his interest to disclose that fact. In all, it seems to me that the only party with an interest in not answering Defendants’ counsel’s inquiry about a costs provision in the retainer agreement is Class Counsel.

[40] At the hearing of the motion, the lawyer for Class Counsel submitted, without saying what is or is not in the retainer agreement, that it is possible that the retainer contains an indemnity clause with respect to costs, but not a “guarantee”. By that, he meant that it may be that Class Counsel has provided the representative Plaintiff with something like an insurance agreement under which the Plaintiff remains personally liable to the Defendants for an adverse costs award but can make a claim over against Class Counsel for reimbursement.

[41] Under the circumstances, this would suggest the harshest form of liability “insurance” coverage, with the indemnity obligation being triggered not with the determination of the insured’s liability (since the costs Order is already in place), but as a result of execution against the client and the client’s eventual claim against Class Counsel. Counsel for Class Counsel indicated that it was now for the Defendants to pursue enforcement against the representative Plaintiff – e.g. a judgment debtor examination, execution against any property he owns, seizing any accounts he may have, garnishment of any debt or wages owing to him, etc. After that, it is up to the representative Plaintiff, if he has survived, to either litigate or settle the indemnity claim with Class Counsel.

[42] Given Class Counsel’s rather coy position with respect to disclosure of the cost provision, or lack thereof, in the retainer, it is unclear to me what kind of commitment, if any, Class Counsel made the representative Plaintiff. That alone is something of a shock to the system, which generally relies on disclosure being made where required.

[43] But if the retainer is what Class Counsel’s lawyers posit – admittedly, by way of example, not as a factual account – it is equally surprising. As Justice Glustein said in *Davidson, supra*, at para 25: “The case law is replete with six and seven figure costs awards on unsuccessful certification motions. Such costs awards could not be supported by a representative plaintiff who brings a proposed class action on behalf of proposed class members. Typically, the class seeks damages that are significant at a class level, but dramatically smaller at an individual level.”

[44] To the best of my knowledge, the approach put forward as a possibility by Class Counsel and their lawyers would be far more onerous on the insured than anything that, for example, Law

Pro or other well known professional liability policies impose on their clientele. Professional liability insurers may contest liability to the claimant; but once liability is determined by a court, the coverage materializes and the insurer pays the claim.

[45] Here, Class Counsel and their lawyers seem to suggest that even after liability for costs has been determined, the representative Plaintiff must then exhaust his resources by fending off the Defendants' attempt to collect what is owed and then pursuing Class Counsel who may or may not give an inch on the indemnity. If that is the nature of Class Counsel's obligation to the representative Plaintiff, it is as good as having taken on no obligation at all.

[46] As indicated above, I expressed in *Navaratnarajah Costs*, at para. 17, my expectation that "an indemnification against an adverse costs award is expected of Class Counsel." I did not expect there to be a question of whether there was such an agreement in Class Counsel's retainer, and I did not expect that, if there was one, the question of Class Counsel's honouring it would be left to a process that included the Defendants engaging in full creditors' rights proceedings against the representative Plaintiff and, possibly, further litigation by the representative Plaintiff against Class Counsel.

[47] The purpose of requiring costs coverage by any class counsel is to alleviate the burden from the person who puts their name forward as representative of the class, not to extend the burden and deplete the person's resources. As Justice Belobaba expressed it in *MacDonald v. BMO Trust Co.*, 2021 ONSC 3726, at para. 43, "Given that no class action will ever proceed without a cost indemnity for the representative plaintiff, class counsel will typically assume the adverse costs risk themselves..." Whatever else Class Counsel has done in this case, they have not assumed the adverse costs risks themselves. Had they done so – i.e. had they stepped up and relieved the representative Plaintiff of the burden – this motion to vary the costs Order would not have been brought.

[48] Therein lies the surprise change from the premise of the costs ruling and the facts as known at the time. The costs Order, directed only against the representative Plaintiff on the assumption that that would engage Class Counsel's responsibilities, was based on a record whose erroneous state of facts was not and could not have been known. In that respect, I am not *functus officio* and the costs Order can be varied.

V. Amending or varying the Order

[49] Rule 59.06(1) of the *Rules of Civil Procedure* provides that an Order may be amended or varied in circumstances where "a party can demonstrate that a judgment was obtained by fraud or where new and critical evidence is discovered that could not have been known through due diligence." Rule 59.06(2) goes on to state that, "A party who seeks to...(a) have an order set aside or varied on the ground of fraud or facts arising or discovered after it was made...may make a motion in the proceeding for the relief claimed."

[50] Counsel for Class Counsel rely on the Court of Appeal’s statement in *Royal Bank of Canada v. Korman*, 2010 ONCA 63, at para 24, for their submission that Rule 59.06 “does not contemplate altering a judgment or order to provide relief never sought in the moving party’s pleading”. The reference to pleadings signals that the Court of Appeal had before it a final judgment, which of course must be based on the pleadings and matters on which the parties joined issue; it cannot decide or order something unilaterally added after judgment is rendered: *Singh v. 1282439 Ontario Ltd.*, 2007 Can LII 18578, at para. 20.

[51] That logic has little application to the present motion. There is good reason that the Defendants did not initially seek to have a costs Order against Class Counsel: the fact that it might be needed was obscured. After all, Class Counsel’s Notice of Certification had specifically represented to the class, including to the representative Plaintiff, that they did not have to concern themselves about costs. That representation, in turn, accorded with the prevailing practice in Ontario class actions.

[52] Based on the record of proceedings, I assumed, and therefore found, a state of affairs with respect to costs coverage that turns out not to exist – i.e. that an Order against the Plaintiff would, as a matter of course, be covered by Class Counsel. With new facts now in hand, that Order needs to be varied. It is the very newness of the state of the factual record that continues to give the Court its jurisdiction. To say that the Order cannot be varied because the variance was not sought in the first place would, under the circumstances, render this jurisdiction and the authority of Rule 59.06 meaningless.

[53] The authority to vary an Order under Rule 59.06 can also be read in combination with the Court’s inherent jurisdiction to control its own processes, which it “may draw upon as necessary whenever it is just or equitable to do so...”: *Endean v. British Columbia*, [2016] 2 SCR 162, at para. 23. The Court of Appeal has confirmed that this inherent authority of the superior courts includes the power to order costs to be paid by a non-party to the action: *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, at para. 66.

[54] Furthermore, in its case management capacity the Court retains the broad authority under section 12 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”), to “make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination...”. In the circumstances of this motion, the variance sought by the Defendants to add Class Counsel to the costs Order “can be viewed as an aspect of the Court’s supervision of Class Counsel” and of the class itself: *Del Giudice v. Thompson*, 2020 ONSC 3623, at para. 30.

[55] Finally, counsel for the Defendants seek to invoke the Court’s authority under Rule 57.07 to fashion a costs order aimed at a party’s solicitor of record where there has been added costs due to “undue delay, negligence or other default”. I indicated in my costs ruling and again in the present ruling that delay and futile procedures that increase costs have been a feature of Class Counsel’s approach to this action.

[56] That said, undue delay it is not on its own the specific cause for the motion before me. The delays and futile strategies pursued by Class Counsel undoubtedly increased the costs. But what prompts this motion is the revelation that, contrary to all understanding by the Defendants and by the Court, Class Counsel has not covered, and gives every indication that it will not cover the costs for the representative Plaintiff. Having been misled into thinking that no motion was needed against Class Counsel since the Notice of Certification and standard practices for class actions in any case requires Class Counsel to step into the representative Plaintiff's shoes in paying costs, the Defendants brought no Rule 57.07 motion in the first instance.

[57] In these circumstances, where it is the surprising lack of a clause requiring Class Counsel to pay the representative Plaintiff's costs, and not first and foremost the undue delay itself, that has prompted this motion to vary, Rule 57.07 is neither applicable nor necessary. The situation before me fits squarely into the Court's inherent power to make an order "where it is just and equitable to do so" – including one directed to a non-party such as Class Counsel. It also falls well within the Court's case management authority under s. 12 of the *CPA* to make an order "respecting the conduct of a proceeding...to ensure its fair and expeditious determination". Without varying the costs Order, the proceeding looks to be far more protracted and unfair to all concerned.

[58] The situation is rather unique. It calls not for the specific authority of Rule 57.07, but rather for an application of "the reserve or fund of powers...which the court may draw upon as necessary whenever it is just or equitable to do so": *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 SCR 3, at para. 20, quoting I.H. Jacob, "The Inherent Jurisdiction of the Court", 23 *Curr. Legal Probs.* 23, at p. 51.

[59] It would be distinctly inequitable and unjust to the Defendants to compel them to choose between giving up their costs or pursuing onerous enforcement proceedings against a Plaintiff who may not be able to pay, and who in ordinary practice should not have to pay. And it would be even more unjust and inequitable to force the representative Plaintiff to incur the personal expense of either personally paying the costs incurred on behalf of the class or further litigating the matter with the Class Counsel he had retained.

[60] These choices, and the overall situation with respect to Class Counsel's cost responsibilities, now drive the need for a Rule 59.06 variance of the costs Order.

VI. Disposition

[61] The Order issued pursuant to *Navaratnarajah Costs*, at para. 24, is hereby varied to add Class Counsel as a party responsible for payment of those costs.

[62] The parties may make written submissions with respect to costs of this motion. I would ask Defendants' counsel to send my assistant brief submissions by email within two weeks of today,

and for counsel for Class Counsel to send my assistant brief submissions by email within two weeks thereafter.

Date: June 17, 2026

Morgan J.