COURT FILE NO.	1703 12327	Clerk's Stamp JUDICIAL CENTRE OF EDMONTON FILED OCT 18 2019 Clerk of the Court of Queen's Bench
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. and CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT **BOOK OF AUTHORITIES OF CANADIAN WESTERN BANK**

FOR APPLICATION BEFORE MR. JUSTICE S.D. HILLIER NOVEMBER 6, 2019 WITH RESPECT TO COSTS CLAIMED AS AGAINST 726 REMOTE ACCOMMODATIONS LTD.,726 MODULAR FINANCE LTD. AND RELIANT ASSET MANAGEMENT, LLC

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, Q.C./ Ryan Trainer Telephone: (780) 482-9115 Fax: (780) 733-9757 Email: crussell@mross.com File No.: 165813

TABLE OF AUTHORITIES

TAB – 1

2019 ABQB 275
Alberta Court of Queen's Bench

R&R Consilium Inc v. Talbot

2019 CarswellAlta 788, 2019 ABQB 275, [2019] A.W.L.D. 1820, [2019] A.W.L.D. 1864, 305 A.C.W.S. (3d) 44

R&R Consilium Inc. and Ranbir (Ron) Kang (Applicants) and Keith Talbot, Marvin Jones, and Weslease Income Growth Fund (Respondents)

G.A. Campbell J.

Judgment: April 18, 2019
Docket: Calgary 1801-06978

Counsel: Jerry J. Patterson (written), Lorne J. Graburn (written), for Applicants
Liam Oddie (written), for Simmons Financial Restructuring Corp.
Peter T. Linder, Q.C. (written), for Respondents

Subject: Civil Practice and Procedure; Estates and Trusts

ADJUDICATION on costs.

***G.A. Campbell J.*:**

1 The Applicants, R&R Consilium Inc. and Ranbir (Ron) Kang, commenced an originating application against Keith Talbot (Talbot), Marvin Jones (Jones) and Weslease Income Growth Fund (the Trust) (collectively, the Respondents) seeking to have an extraordinary resolution of unitholders of the Trust declared valid and binding on the Trust as of 9 May 2018 (the Application). The Applicants were ultimately successful on their Application.

2 The parties could not agree on costs. The Applicants seek solicitor and own client costs or enhanced costs and recovery of expert fees from Talbot and Jones. The Respondents, Talbot and Jones, oppose any such costs awards and argue that, in the circumstances, each party should pay their own legal costs.

Background

3 For context, some of the relevant background facts are reviewed.

4 In April 2018, the Applicants instructed its agent to send to all unitholders of the Trust an extraordinary resolution in writing that asked unitholders to vote in favor of the resolution (the Removal Resolution) that would remove the Trustees, who at the time were Talbot and Jones (together the Trustees), and appoint Kang and two others as the new trustees of the Trust (the New Trustees).

5 Wheelhouse Support (Wheelhouse) was retained to manage the voting process and act as scrutineer in verifying and tallying Removal Resolutions received from unitholders.

6 On 23 April 2018, the Applicants' agent gave written notice to the Trustees (the Trustee Removal Notice) that, as at 20 April 2018, (the Effective Date) the Removal Resolution had passed with 67.51% of all the Trust's unitholders in support, which was more than the 66 2/3 % of the outstanding units required for removal and replacement of the Trustees under the Trust's Declaration of Trust (the Declaration of Trust).

7 On 24 April 2018, the Trustees asked for the Removal Resolutions and the signed authorizations to establish that the Removal Resolution had passed by the requisite number of unitholder votes.

8 After review of the Removal Resolution information, the Trustees raised concerns regarding the tabulation of the Removal Resolutions. They determined that the Removal Resolution had been validly executed by only 62.39% of the unitholders as of 20 April 2018, which was the date stipulated in the Trustee Removal Notice. The Trustees advised the Applicants that they would not give effect to the Removal Resolution as it had not been passed with the requisite majority in accordance with the terms of the Declaration of Trust. The Trustees advised they would therefore continue to act as the Trustees.

9 The Applicants disagreed, relying on the Wheelhouse tabulation, which showed that the requisite threshold of 66 2/3 % support had been obtained as at 20 April 2018.

10 By 25 April 2018, the Wheelhouse tabulation showed that unitholder support for the Removal Resolution had increased to 68.18% of the issued and outstanding units.

11 There were three prior appearances in court on the Application before the court finally ruled on the Application at the 29 June 2018 hearing. Six affidavits and two expert reports were filed (with thousands of records). Seven separate cross-examinations were conducted.

12 At the first appearance on the Application on 22 May 2018, the court granted the Respondents' request for adjournment to cross examine Kang and the Wheelhouse representative and to file responding materials.

13 At the second appearance on the Application on 25 May 2018, the Respondents requested a further adjournment of the Application to consider the new affidavit of the Wheelhouse representative filed on behalf of the Applicants. In light of conflicting affidavit evidence on the validity of the Removal Resolutions, the court ordered the retention of Kingsdale Advisors (Kingsdale) to act as an independent scrutineer to tabulate the Removal Resolution as at the Effective Date. The Applicant was adjourned again to permit further cross examination by the Respondents and complete the tabulation by Kingsdale.

14 At the third appearance on the Application on 14 June 2018, the parties appeared to settle the terms of the order granted on 25 May 2018 and the Respondents requested an adjournment of the 29 June 2018 hearing date. The court settled the terms of the May 2018 order, permitted the Applicants to file a further affidavit to respond to the Trustees' new allegation of forged signatures and set timelines for completing cross examinations on new affidavits and filing of briefs.

15 At the 29 June hearing of the Application, the court considered the report issued by Kingsdale (the Kingsdale Report) that indicated that the Removal Resolution had 65.01% of valid votes tabulated from Removal Resolutions and 67.46% final valid Removal Resolutions cured with additional evidence.

16 The Trustees raised issues with the manner in which Kingsdale accounted for the valid Removal Resolutions. In light of the concerns identified by the Trustees, the court reviewed each conclusion reached by Kingsdale and its reasons for each conclusion on a series of identified categories of votes and ruled on whether the Kingsdale conclusion on each category would be accepted, rejected or modified. At the completion of this review, the court confirmed that the Removal Resolution had passed with the support of 67% of the unitholders. Talbot and Jones were ordered to be immediately replaced with the New Trustees.

Parties' Positions

17 I turn now to the parties' positions.

The Applicants

18 The Applicants contend that Talbot and Jones, acting in conflict with their obligations as Trustees, hindered and delayed the Application out of self-interest as they fought to stay in control of the Trust. The Applicants contend that Talbot and Jones,

in the face of an overwhelming expression of desire from unitholders to remove them as Trustees, forced them to exhaust proceedings in order to remove them as Trustees.

19 The Applicants point to Talbot's and Jones's requests for adjournments at each of the three prior appearances before the hearing of the Application. They point to evidence that Talbot and Jones instructed a Trust employee to find any reason to exclude favourable Removal Resolutions. They point to Talbot and Jones unwillingness to take steps to validate Removal Resolutions, such as: rejecting outright Removal Resolutions that they suspected had forged unitholder signatures but taking no steps to contact the unitholder to determine whether this was the case; disregarding Removal Resolutions that had been sent directly to the Trust rather than to the Applicants' agent; and, refusing to count Removal Resolutions with trifling errors. They also point to the Talbot's and Jones's 2-week delay in disclosing their handwriting expert's report. Finally, they point to their letter writing campaign, which disparaged the New Trustees and invited unitholders to rescind their Removal Resolutions.

20 The Applicants contend that delay was to the benefit of Talbot and Jones as they were concealing their intention to place Talbot-controlled Weslease Income Growth Fund Limited Partnership (the Limited Partnership) into creditor protection, which was indebted to the Trust for approximately $70 million and doubts had been raised about the financial ability of the Limited Partnership to continue to pay the Trust.

21 The Applicants submit that all of these improper and self-serving attempts by Talbot and Jones to stay in control of the Trust caused the Applicants to incur significant solicitor and own client legal fees of $251,757.50 plus GST and disbursements and that a lump sum costs award of that amount payable by Talbot and Jones personally would be appropriate in the circumstances.

22 Alternatively, the Applicants contend that the circumstances here call for enhanced costs that would indemnify them for a high level of indemnification, by using either a percentage of their solicitor and own client legal fees or a multiplier of its costs calculated using Column 5 of Schedule C of the *Alberta Rules of Court* (the *Rules*).

23 The Applicants submit that awarding costs using only the dollar amounts under Column 5 of Schedule C would be unfair and unreasonable because it would not provide for an appropriate level of costs for this commercial case. Such a costs award would only indemnify the Applicants for 7.5% of actual legal fees incurred. The Applicants point to case law that an award for costs should approach 40% to 50% indemnity: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.) (CanLII) at para 22 [*Trizec*]; *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.) (CanLII) at para 68 [*Blaze Energy*].

24 The Applicants argue that the blameworthy conduct and breach of fiduciary obligation by Talbot and Jones would warrant a high level of indemnification that should exceed 50% indemnification of their actual legal fees incurred.

25 Finally, the Applicants submit that the fee paid for the expert Kingsdale is a proper recoverable disbursement because it was reasonable to retain Kingsdale in the circumstances here, where the validity of accepted Removal Resolutions was challenged. The Applicants submit that the Kingsdale Report, while not entirely accepted by the court, did assist the court in its ruling on the issues of difference between the parties.

Talbot and Jones

26 Talbot and Jones point out that although the Applicants had named them and the Trust as Respondents, the Applicants are now only seeking costs from them as the Trustees. They say that as Trustees they have a right to be indemnified by the Trust for their own legal expenses in reasonably defending the Application on behalf of the Trust.

27 Talbot and Jones submit that this is a classic case in which the court should exercise its discretion to order that each party bear their own legal costs. They submit that the Applicants were ultimately successful but only because they were able to rely on subsequently acquired "curative" evidence to establish and verify that the Removal Resolution had passed with the support of the requisite number of unitholders as of the Effective Date.

28 Talbot and Jones contend that it was the Applicants own conduct that necessitated this litigation and greatly contributed to the complexity, duration and expenses of this litigation by using a flawed process in their efforts to remove them as Trustees.

29 Talbot and Jones say that the Applicants chose to use an unqualified and conflicted scrutineer that gave them a dropbox of Removal Resolutions, making it impossible to determine the validity of many of the Removal Resolutions being counted. They had ascertained from the Applicants' supplied information that the Removal Resolution had not in fact been passed by the requisite majority of unitholders because deficient Removal Resolutions should not have been included in the tabulation.

30 Talbot and Jones argue that it was the Applicants' last-minute affidavit evidence that necessitated their adjournment requests. They contend that the voting process was further complicated by the Applicants' failure to appoint an independent chairperson to deal with faulty Removal Resolutions and to set a clear record date. They say it was the Applicants' faulty tabulating process that resulted in the need for a court-appointed scrutineer to validate and count the Removal Resolutions. Proper tabulation of the Removal Resolutions was further compromised when the Applicants interfered with the independence of the court-appointed scrutineer, Kingsdale, which resulted in the court assuming a chairperson role and ruling on the validity of the Removal Resolutions.

31 Talbot and Jones contend that they acted entirely proper and consistent with their fiduciary duties owed to the Trust and its unitholders. They did not believe that the take-over of the Trust by the New Trustees was in the best interests of the unitholders and they acted entirely proper in taking the steps they did to determine if the Removal Resolution had in fact passed on 23 April 2018, being the date of the Trustee Removal Notice sent to them. Talbot and Jones assert that they owed a duty to the unitholders not to allow the New Trustees, who had not been duly elected in accordance with the Declaration of Trust, to replace them and take over control of the Trust's property to the potential detriment to unitholders. They point out that at the time of the Application they were receiving no compensation from the Trust.

32 Talbot and Jones argue that if the Applicants had followed a simple and proper process that would have validated that the Removal Resolution had passed has of 23 April 2018, this litigation would have been wholly avoided or resolved quickly. Consequently, each party should bear their own court costs.

33 In any event, Talbot and Jones contend that none of their conduct undertaken in this Application would warrant an award of solicitor and own client costs against them as Trustees. They say there are no rare and exceptional circumstances here to suggest that their conduct as Trustees was reprehensible, scandalous or outrageous. Rather, as Trustees, it was their fiduciary duty to question the Removal Resolution and not to give effect to a resolution that had not, on the face of the record provided to them, passed with the requisite number of supporting unitholders.

34 Talbot and Jones reject any suggestion that they delayed this Application to give them time to place the Limited Partnership into bankruptcy or seek creditor protection. They took the steps they did because the Limited Partnership was insolvent and needed creditor protection. They also say that any delays were caused by the Applicants' tendering of successive curative evidence in an effort to shore up their deficient Removal Resolutions, which continued right up until the hearing of the Application on 29 June 2018.

35 Talbot and Jones submit that the circumstances here differ greatly from the *Blaze Energy* case, in which a costs award was made applying a multiplier to Column 5 of Schedule C. Talbot and Jones say that because declaratory relief was sought here and no monetary amount was in dispute that the default under Schedule C would be Column 1.

36 Talbot and Jones submit that the Applicants should not be able to recover the Kingsdale fees because its evidence was rejected by the court and the Applicants had compromised Kingsdale's independence.

37 Talbot and Jones submit that because they are entitled to be indemnified for legal fees incurred by them in properly responding to the Application, any costs awarded should be awarded against the Trust alone.

Applicable Legal Principles

38 It is well-accepted law that costs awards are in the Court's discretion. However, that discretion is to be exercised judicially, with a sound basis for making a costs award that, overall, is reasonable in the circumstances.

39 A party who is substantially successful following a contested application should normally be awarded costs, absent other considerations.

40 In making a costs award, the Court may consider any matter related to the question of reasonable and proper costs that the Court considers appropriate (*Rule* 10.33(1)). In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all the relevant circumstances including: the result of the action and the degree of success of each party; the importance of the issues; complexity of the action; conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action; a party's denial of or refusal to admit anything that should have been admitted; and, whether any application, proceeding or step in an action was unnecessary, improper or a mistake (*Rule* 10.33(2)).

41 Generally, there are three types of costs awards (*Trizec* at para 19):

1. Solicitor and own client or full indemnity costs - the successful party receives complete indemnification of their legal fees, which may also include payment for other services that are not essential to the litigation in the case;

2. Solicitor-client costs - the successful party receives its reasonable legal fees and disbursements, which may not amount to complete indemnification; and

3. Party-party costs - is the usual costs award in which the successful party receives the costs under Schedule C to the Rules, which may be "enhanced" to an amount more than those amounts set out in Schedule C using some multiplier thereof, extra lump sums, some percentage of solicitor and own client costs or some other reasonable calculation, together with reasonable disbursements.

42 The case law recognizes that a departure from party and party costs should only be made in rare and exceptional circumstances.

43 The case law also establishes that, generally, solicitor and own client costs are only to be awarded against a party in cases where that party has engaged in reprehensible, scandalous or outrageous conduct during the course of the litigation: *Goska J. Nowak Professional Corp. v. Robinson*, 2016 ABCA 240 (Alta. C.A.) (CanLII) at para 30.

Analysis

No Costs Award

44 Ultimately, the Applicants were successful with their Application and the circumstances here do not justify departing from the over-arching principle that the successful party, the Applicants, are entitled to costs.

45 As urged by Talbot and Jones, I considered the imperfect resolution process undertaken by Applicants and that the Applicants provided an imperfect record to them as the Trustees.

46 Wheelhouse's records were not meticulously kept. Misplaced Removal Resolutions were provided to the Trustees when later found. This imperfection contributed to the difficulties the Trustees and the Court had in verifying whether the requisite Removal Resolutions had been obtained to pass the Removal Resolutions as at the Effective Date. However, and of significance in declining to make a no costs award as urged by Talbot and Jones, the resolution process undertaken by the Applicants was compromised by the Trust's Declaration of Trust itself, which did not provide for any process for tabulating resolutions, such as mandating a process for determining qualifying and disqualifying resolutions received, revoking resolutions once cast, the appointment of a chairperson to rule on questionable resolutions and so on. Verification of the resolution voting process was further hampered by the Trust's failure to keep an updated, fulsome registered list of unitholders, which led to issues with unitholders that used both an English and a Chinese name, joint unitholders but with only one name recorded on the register,

unit holders that had supposedly redeemed their units but whose names remained recorded on the register, and presumably dated signatures, which led to questions about signatures that did not match those on the register and allegations of forgery.

47 It was these issues together with the conflicting evidence provided by the parties that resulted in the court-ordered appointment of the independent scrutineer, Kingsdale.

48 Finally, given the increasing support for the Removal Resolution by the unitholders, the continuation of Talbot and Jones as Trustees was doomed. Even with the Removal Resolutions that were disqualified for technical non-compliance, the Applicants could have served a new notice of removal to the Trustees advising of their removal once again a few days later. The futility of these Trustees' actions and assertions were ultimately confirmed at the June 29 hearing of the Application. The Trustees were not successful in their contest, the Applicants were.

49 In the result, the Applicants are entitled to a costs award.

50 The question is what are the appropriate costs to award here.

Solicitor and Own Client Costs Award

51 I am not satisfied that this is the type of rare and exceptional circumstance with such intentional scandalous or reprehensible litigation misconduct that would justify an award of solicitor and own client costs in favour of the Applicants.

52 Much of the Applicants' assertions of the Trustees' misconduct such as breach of fiduciary duty, abuse of process, engaging in wilful misconduct, withholding financial statements are assertions and allegations that were not proven in this proceeding and, indeed, have been strenuously disputed by Talbot and Jones. For example, I did not find instructing a Trust employee to find reason to exclude Removal Resolutions reprehensible or scandalous misconduct. If there was a good reason, a Removal Resolution should be excluded and some were excluded. The Applicants were asserting that they had the requisite Removal Resolutions and the onus lay with them to ensure that they had valid Removal Resolutions.

53 Notwithstanding the Applicants' assertions, my view is that the Trustees were justified and acted properly in asking for more information to verify the results of the Removal Resolution. They were entitled to take reasonable steps and make reasonable inquiries to satisfy themselves, in their position as the Trustees of the Trust, that the Removal Resolution had in fact passed as of the Effective Date. Further, advancing a position with little or no merit is not itself a ground for awarding solicitor and own client costs: *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2012 ABQB 438 (Alta. Q.B.) (CanLII) at para 18.

54 That said, the Trustees did take some unreasonable positions - for example, refusing to accept votes by unitholders that used the dollar value rather than the number of units (easily verified as one unit was $10), suggesting that the Applicants had undermined the independence of Kingsdale, which was not validated, and were unreasonably resistant on many fronts, adding to the complexity and cost of the litigation. However, some of the concerns raised required independent examination and judicial resolution.

55 There was, however, an aspect of misconduct, in that the Trustees raised technical issues of non-compliance that arose from their own deficient recordkeeping practices. Their complaints about the propriety of "curative" evidence was quite misplaced as this was the only way to determine whether their claims of invalid Removal Resolutions had merit. More concerning were the circumstances surrounding their allegations of forged signatures, which were seemingly pointed at the Applicants but fell short of actual accusations. There was also their letter writing campaign, which was certainly indicative of the fact that Talbot and Jones did not want to be replaced as Trustees and were actively soliciting unitholders to withdraw their cast Removal Resolutions.

56 However, I do not find their litigation misconduct was such so as to warrant full indemnification costs on a solicitor and own client basis. Their actions are more properly addressed by enhanced costs, not solicitor and own client costs.

Enhanced Costs

57 Notwithstanding the Applicants' imperfect resolution voting process, enhanced costs are warranted as this was costly commercial litigation that settled a critical matter for the Trust - effect was given to unitholder desires as to who were to be their Trustees - and this settlement required intensive litigation and on an expedited basis.

58 The Applicants claim that their lawyers completed certain tasks as reflected in their draft Bill of Costs and that they have spent $251,775 for those legal services. No detailed statement of account was provided and these legal fees appear not to have been assessed for reasonableness under the *Rules*.

59 The Applicants' draft Bill of Costs on Column 5 would provide for taxable costs of $19,000 plus disbursements and GST. If enhanced costs exceeding 40% to 50% of the Applicants' solicitor and own client costs of $251,775 were ordered as requested by the Applicants, this would amount to something more than $125,000 for four chamber appearances and related cross-examinations on affidavits and preparation of related documentation.

60 Talbot and Jones, relying on section 1(4) of Schedule C, suggest that the appropriate column for any award of party and party costs would be Column 1 because only declaratory and no monetary relief was sought. Section 1(4) of Schedule C says that a costs award is based on Column 1 when no monetary relief is claimed.

61 When no monetary relief is sought, it may be appropriate to depart from Column 1 of Schedule C due to the complexity of the litigation, the amount potentially at stake and if there is much to win or lose for the parties: *Blaze Energy* at para 80. Further considerations include actual solicitor-client fees charged far exceeding Schedule C amounts, which have not kept pace with inflation, where some steps taken are duplicative, unnecessary or overcautious and where there has been misconduct by the losing party.

62 The circumstances here support a departure from Column 1 of Schedule C.

63 The Application was moderately complex and it was necessary for the Applicants to respond to changing claims. Assuming the actual legal costs of some $250,000 are reasonable and proper (and there is no evidence they are not), they far exceed the amounts that would be provided under any Column of Schedule C. As the Applicants were seeking to wrest control of the Trust from the Trustees, the importance of resolving this issue for the parties and the Trust and its unit holders was substantial. The Application would result in new Trustees for the Trust and new stewardship of its considerable assets. The value of the assets sought to be interfered or controlled with in this case significantly exceeded the threshold amount of $1.5 million contemplated by Column 5 of Schedule C. While only declaratory or non-monetary relief was sought here, given the economically significant outcome to the Respondents, both the Trust and the Trustees, the value of the assets sought to be controlled or interfered with, would provide a reasonable basis for assessing what would be the appropriate Column of Schedule C when ordering party and party tariff costs.

64 For these reasons, column 5 of Schedule C is the appropriate Column.

65 The Court is not restricted to awarding costs pursuant to the amounts set out in Schedule C of the *Rules*.

66 In deciding this costs issue, the court is given wide latitude to adjust Schedule C if tariff costs would provide an inadequate result. Accepted adjustments have included among others: a higher column; multipliers of a column; extra lump sums; some form of solicitor and client costs and adjustments for inflation. Ultimately, the court must assess what would be a reasonable final costs amount: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.) at para 4.

67 In determining the reasonable costs for the Application, the following factors were considered:

1. The Application was a moderately complex commercial matter and consisted of four contested chambers applications, extensive affidavit evidence, including cross examinations and preparation of lengthy briefs and associated documentation on an escalated time line;

2. The issue in dispute required independent verification of Removal Resolutions received by the Applicants - a step necessitated by the Trustees' contest of the validity of the Removal Resolutions received and somewhat by deficiencies in the Removal Resolution information provided by the Applicants;

3. Curative evidence was required to prove the validity of certain of the Removal Resolutions, which delayed and complicated the Application; this extra step resulted largely from the Trust's recordkeeping practices and its Trustees' unreasonable positions. Examples of curative evidence included confirmation that a Removal Resolution had been signed by the unitholder and not forged; confirmation that an English name used was the same person who had provided the Trust with only their Chinese name; confirmation that dollar values used were mistakenly used instead of the number of units held; and, confirmation that a signatory received was an unrecorded joint unitholder;

4. The Trustees' alleged that certain unitholder's signatures on the Removal Resolutions could have been forged because they did not match that on the Trust register even though the evidence showed the Removal Resolutions had been sent to the address given on the Trust's register. These unfounded allegations delayed and complicated the Application because rather than simply contacting the individual unitholder to verify they had signed the Removal Resolution, an unhelpful handwriting expert's opinion was obtained which did not prove the allegations;

5. While there were issues with some of the Removal Resolutions, the Applicants received Removal Resolutions on all three counts undertaken (Wheelhouse, Kingsdale, and the court) that exceeded the requisite majority for passing of the Removal Resolution;

6. The evidence demonstrated that the number of unitholders in favour of the Removal Resolution were increasing every day after the Effective Date, notwithstanding the Trustees were actively soliciting unitholders to revoke their Removal Resignations; and

7. The Trustees complicated and delayed the process when they called into question the independence of the court appointed scrutineer, although there was no substantiated basis for their assertion. The court's decision to review the Removal Resolutions was not because of any lack of independence on the part of Kingsdale but rather to settle the parties' differing positions.

68 Considering these matters, I do not think that using a percentage of the incurred solicitor and own client legal fees would provide an appropriate result because to do so would provide partial indemnity for all legal expenses incurred with no assessment as to whether they were reasonable or proper for a moderately complex litigation completed in a short time with some defensive misconduct.

69 Rather, I am satisfied that ordering the Respondents, namely Talbot, Jones and the Trust, to pay a multiplier to the costs calculated using Column 5, Schedule C, is an appropriate way to measure the Applicants' reasonable and proper costs in this case. I therefore award enhanced costs of double the calculated Column 5 costs of $19,000, for total enhanced costs of $38,000.

70 Gauged against the actual legal fees incurred here, it is clear that the costs provided for under Column 5 of Schedule C are severely out dated and do not provide a fair current money value for the efforts undertaken by the Applicants to obtain the relief they sought. While no evidence was provided, our Court of Appeal in 2015 noted that the Bank of Canada online Inflation Calculator indicated that the average cost of living in Canada since 1998 has been approximately 39%: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.) (CanLII) at para 10. The enhanced costs awarded here will be increased by 40% as an adjustment for inflation that will bring the total costs award to $53,200 plus the disbursements of $5397.42 and the applicable GST, which I find are reasonable disbursements in this case.

Expert Fees

71 I next consider next the fees incurred for retaining the independent scrutineer, Kingsdale.

72 Our Court of Appeal has endorsed the principle that the primary factor in awarding expert witness costs is whether the expenditure was reasonable at the time incurred: *Seidel v. Kerr*, 2004 ABCA 157 (Alta. C.A.) (CanLII).

73 Given the dispute between the parties as to the validity of some of the Removal Resolutions and concerns with the manner in which the Applicants' agent handled the Removal Resolution solicitation process, the Court ordered that the Applicants retain an independent scrutineer to confirm the Removal Resolutions received.

74 Kingsdale, the entity ultimately chosen by the parties to act as independent scrutineer, provided the Kingsdale Report. Kingsdale, as detailed in the Kingsdale Expert Report, reviewed all the Removal Resolutions received by the Applicants, identified deficient Removal Resolutions and gave reasons, based on the accepted industry standards set out in *The Securities Transfer Association of Canada Protocol*, for accepting or rejecting a Removal Resolution.

75 While I did not accept all of the conclusions in the Kingsdale Report, the information it provided was helpful and of assistance to the Court in deciding whether to accept or reject the identified questionable or deficient Removal Resolutions and confirm the number of unitholders in favour of the Removal Resolution.

76 Despite the contentions of Talbot and Jones, I was not persuaded that Kingsdale's independence had been compromised and that contention did not factor into my reasons for rejecting some of Kingsdale's conclusions and opinions.

77 In my view, the expert evidence provided by Kingsdale was of assistance to both sides, and, overall, of particular assistance to the Trust and its unitholders as this evidence was very instrumental in ensuring that proper effect was given to unitholders' intentions as to who would be the Trust's Trustees and as such responsible for stewardship of the Trust's property.

78 I am satisfied that it was reasonable to retain Kingsdale and its fees for the services it provided to the Court were reasonable.

79 For these reasons, the Applicants are entitled to recover the fees it paid to Kingsdale in the amount of $25,000 and applicable GST from the Trust alone, as it was the ultimate beneficiary of this expert evidence.

Decision

80 I have exercised my discretion to order the Respondents to pay the Applicants enhanced costs of $38,000 increased by 40% to account for inflation for a total costs award of $53,200 and the disbursements set out in the Applicants' draft Bill of Costs of $5397.42 and the applicable GST.

81 The Applicants are also entitled to recover from the Trust alone the full expert fees they paid to Kingsdale in the amount of $25,000 and applicable GST.

82 There was an issue raised as to whether Talbot and Jones could be indemnified by the Trust for any costs award made against them as the Trustees of the Trust at the time of the Application. The question of whether these Trustees are entitled to be indemnified is not a costs issue but rather one of indemnification that would properly require evidence that is not before this Court, including a consideration of the terms of the Trust's Declaration of Trust itself and evidence of conduct. Further, allegations of impropriety by Talbot and Jones have not been proven and remain only allegations. If Talbot and Jones wish to pursue any claim for indemnity for any costs they are required to pay that will require further action on their part.

83 Regarding costs for filing written submissions on these outstanding costs issues, each party shall bear their own costs as success has been divided.

Order accordingly.

End of Document

TAB – 2

Most Recently Cited in: CZ v. RB, 2019 ABQB 367, 2019 CarswellAlta 968, [2019] A.W.L.D. 2135, 305 A.C.W.S. (3d) 564 | (Alta. Q.B., May 16, 2019)

Alta. Reg. 124/2010, s. 10.29

s 10.29 General rule for payment of litigation costs

Currency

10.29General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

10.29(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

Currency
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Concordance References
Rules Concordance 152, Costs for non-compliance with the rules
Rules Concordance 153, Partial indemnity costs

Most Recently Cited in: Claughton v. Bokenfohr, 2019 ABQB 172, 2019 CarswellAlta 440, [2019] A.W.L.D. 1335, [2019] A.W.L.D. 1336, [2019] A.W.L.D. 1337, 302 A.C.W.S. (3d) 780 | (Alta. Q.B., Mar 11, 2019)

Alta. Reg. 124/2010, s. 10.31

s 10.31 Court-ordered costs award

Currency

10.31Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

10.31(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

10.31(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

10.31(4) The Court may adjust the amount payable by way of deduction or set-off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

10.31(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

10.31(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

Currency
Alberta Current to Gazette Vol. 115:12 (June 29, 2019)

Concordance References
Rules Concordance 29, Contents of pleadings
Rules Concordance 153, Partial indemnity costs
Rules Concordance 156, Taxation between party & party

Most Recently Cited in: O'Chiese Energy Limited Partnership v. Bellatrix Exploration Ltd, 2019 ABQB 371, 2019 CarswellAlta 960, [2019] A.W.L.D. 2035, [2019] A.W.L.D. 2038, [2019] A.W.L.D. 2200, 305 A.C.W.S. (3d) 260 | (Alta. Q.B., May 21, 2019)

Alta. Reg. 124/2010, s. 10.33

s 10.33 Court considerations in making costs award

Currency

10.33Court considerations in making costs award

10.33(1) In making a costs award, the Court may consider all or any of the following:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

10.33(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

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

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

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Alberta Current to Gazette Vol. 115:12 (June 29, 2019)

Concordance References
Rules Concordance 153, Partial indemnity costs
Rules Concordance 160, Streamlined procedure for actions under $ amount

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
[Schedules]

Most Recently Cited in: Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH, 2019 ABCA 92, 2019 CarswellAlta 422, [2019] A.W.L.D. 1698, [2019] A.W.L.D. 1701, [2019] A.W.L.D. 1702, [2019] A.W.L.D. 1708, [2019] A.W.L.D. 1709, 304 A.C.W.S. (3d) 270, 84 Alta. L.R. (6th) 33 | (Alta. C.A., Mar 12, 2019)

Alta. Reg. 124/2010, Sched. C

Currency

Schedule C

Division 1 — Tariff of Recoverable Fees

Framework

1(1) This Schedule specifies the lawyer's fees that may be recovered as costs by one party from another.

(2) Each column of the tariff in Division 2 gives a dollar amount range for the purpose of determining the lawyer's fee under that column for the work described under each item.

(3) Subject to subrule (4), the dollar range indicates the amount recoverable

(a) as against the plaintiff, with reference to the amount claimed by the plaintiff,

(b) as against the defendant, with reference to the amount of the judgment or order against the defendant, or

(c) in the case of an interlocutory application, as against the person liable to pay the costs with reference to the amount claimed by the plaintiff.

(4) Unless the Court otherwise orders,

(a) when a remedy is given in a judgment or order other than or in addition to the payment of money, or

(b) when judgment is given for a defendant in an action in which a remedy other than or in addition to the payment of money is sought,

costs must be assessed according to the higher of Column 1 of the tariff in Division 2 and the scale that would have applied if the other remedy had not been given or sought.

What the items in the tariff include

2(1) The description of items in Division 2 includes, with respect to each item:

(a) instructions from a client;

(b) all preparatory work related to the commencement of an action and preparatory work related to an item and the preparation of all records and material;

(c) the drafting, issuing and service of any required commencement document, pleading, affidavit and related documents;

(d) attendances;

(e) correspondence;

(f) all material read or written;

(g) if an application is abandoned, all work done in connection with the abandonment;

(h) other activity undertaken or implied in the item, including necessary or convenient services.

(2) If an item described in the tariff has been started but not completed, or is only partially completed, a proportion of the fee may be allowed.

Application of the tariff

3 The tariff in Division 2 applies whether the services described in the tariff are provided before, at the time or after these rules come into force.

Division 2 — The Tariff

ITEM AND ITEM NUMBER	**COLUMN 1**	**COLUMN 2**	**COLUMN 3**	**COLUMN 4**	**COLUMN 5**
—	**Up to and including $50,000**	**Over $50,000 up to and including $150,000**	**Over $150,000 up to and including $500,000**	**Over $500,000 up to and including $1.5 million**	**Over $1.5 million**
—					

Unless the Court otherwise orders, matters which have no monetary amounts, for example, injunctions, will be dealt with under Column 1. Costs in relation to residential tenancies are not dealt with under any of these columns and are in the discretion of the Court. For monetary amounts within the jurisdiction of the Provincial Court, see rule 10.42.

—					
Commencement documents, pleadings related documents					
1(1) Commencement documents, affidavits, pleadings and related documents, and amendments.	1000	1500	2000	2500	3500
—					
(2) When the matter is uncontested (a default judgment is an example of an uncontested matter), the limit of recovery is 50% of this amount.					
—					
Uncontested trial					
—					
2 Uncontested trial appearance.	200	400	600	800	1000
—					

Disclosure under Part 5					
3(1) Disclosure of records under Part 5, including affidavit of records.	500	750	1000	1250	1500
(2) Review of opposite party documents (once per action), including statement of property: the equivalent of a 1/2 day fee under item 5(2); this amount may be increased if the circumstances warrant.					
(3) If there are only a few records requiring a limited amount of time to review, the fee may be reduced.					
Expedition or better definition of the case					
4 Notice to admit facts, opinion or non-adverse inference or the admission of any of these if, in the opinion of the Court, the notice or admission resulted in expediting the case or better defining the matters in question.	200	400	800	1200	1600
Oral questioning under Part 5					
5(1) Preparation for questioning under Part 5 (once per action): the equivalent of a 1/2 day attendance fee under item 5(2).					
(2) First 1/2 day or portion of it for attendance for questioning under Part 5 of parties or witnesses or cross-examination on an affidavit.	500	750	1000	1250	1500
(3) Each additional 1/2 day (if an attending counsel is acting for	500	750	1000	1250	1500

neither witness nor examining party, 50% of these amounts).					
—					
(4) Preparation of and response to written questions — a fee equivalent to one full day's attendance for oral questioning under this item.					
—					
Applications: uncontested					
—					
6(1) Uncontested applications	300	400	600	700	800
—					
(2) Applications without notice to another party	100	100	100	100	100
—					
Applications: contested					
—					
7(1) Contested applications or assessments and reviews before a master, judge, assessment officer or review officer and appeal from Provincial Court, masters, review officers and assessment officers.	500	750	1000	1250	1500
—					
(2) Contested adjournment applications.	150	150	150	150	150
—					
(3) Abandoned applications: A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned.					
—					
Applications: requiring written briefs					
—					
8(1) Applications when a brief is required or allowed by the Court, including preparation of confirming letters required for					

Family Law Special Chambers:					
—					
First 1/2 day or portion of it.	1000	1250	1500	1750	2000
—					
Each additional 1/2 day (limited to 1/2 day unless the Court otherwise orders).	500	625	750	875	1000
—					
For complex chambers applications, the Court may direct that costs relating to an Appearance to argue before Appeal Court apply, instead of the costs in this item.					
—					
(2) Abandoned applications: A fee equivalent to 50% of the fee that would be payable under this item if the application had not been abandoned.					
—					
Trial readiness/case management					
—					
9(1) Each pre-trial application to schedule a trial date and each case management attendance (including an interlocutory application if it is heard during those applications or attendances, other than an application under rule 6.3).	250	400	600	800	1000
—					
(2) If an interlocutory application is brought under rule 6.3 and heard during case management attendance, the fee awarded may include either a fee for the application or fees for both the application and case management attendance, depending on the duplication of work, if any.					

Trial and summary trial					
10(1) Preparation for trial and summary trial.	2000	4000	6000	8000	10 000
(2) This item amount may be varied up or down depending on the length and complexity of the trial or summary trial.					
11 Trial and summary trial					
For first 1/2 day or portion of it	1000	1250	1500	1750	2000
Second counsel fee (when allowed by trial judge)	500	625	750	875	1000
Each additional 1/2 day	500	700	900	1200	1500
Second counsel fee (when allowed by trial judge)	250	350	450	600	750
Written argument					
12 Submission of written argument at the request of the trial judge or where allowed by the trial judge.	1000	2000	3000	4000	5000
Post-judgment					
13(1) Issue of writ of enforcement, including the registration of the writ in the Personal Property Registry	200	250	300	350	400
(2) Registering a status report in the Personal Property Registry to renew the writ (allowed once every 2 years)	100	100	100	100	100
(3) Registering a status report in the Personal Property Registry to amend the writ	25	25	25	25	25

14(1) Request and review of a financial report from enforcement debtor	100	200	300	400	500
—					
(2) Examination in Aid of Enforcement under the *Civil Enforcement Act*	100	200	300	400	500
—					
15 Seizure and related matters	100	200	300	400	500
16 Garnishee Summons, Notice of Continuing Attachment under the *Maintenance Enforcement Act*, or Garnishee Summons Renewal Statement	200	250	300	350	400
—					
17 Sale of lands under order or judgment (including attendance at sale, whether aborted or not)	200	300	400	500	600
—					
Appeals					
—					
18 All steps taken to file Notice of Appeal and speak to the list	200	300	400	500	600
—					
19 Preparation for appeal					
—					
Preparation of factum	1000	2000	4000	6000	8000
—					
All other preparation	500	1000	2000	3000	4000
—					
20 Appearance to argue before Appeal Court for first 1/2 day or part of it.					
—					
First counsel	1000	1500	2000	2500	3000
—					
Second counsel (when allowed by the Court)	500	750	1000	1250	1500
—					
21 Appearance to argue before Appeal Court for each full 1/2 day occupied after the first 1/2 day.					
—					
First counsel	500	750	1100	1300	1600
—					

Second counsel (when allowed by the Court)		375	500	650	800
—					
22 Appearance on contested application before Appeal Court, including brief.	750	1250	1750	2000	2500

Amendment History

Alta. Reg. 41/2014, s. 9 (Sched. 2)

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End of Document

TAB – 3

2016 ABCA 144
Alberta Court of Appeal

Stewart Estate v. 1088294 Alberta Ltd.

2016 CarswellAlta 820, 2016 ABCA 144, [2016] 9 W.W.R. 230, [2016] A.W.L.D. 1956, [2016] A.W.L.D. 1957, [2016] A.W.L.D. 1991, [2016] A.W.L.D. 1998, [2016] A.W.L.D. 1999, [2016] A.W.L.D. 2000, [2016] A.W.L.D. 2001, [2016] A.W.L.D. 2002, [2016] A.J. No. 454, 266 A.C.W.S. (3d) 309, 35 Alta. L.R. (6th) 1

Lynda Calder in her capacity as Executrix of the Estate of Merville V. Stewart (Deceased), Lynda Calder, Morgan Stewart, Cody Stewart, Cody Stewart in her capacity as Administrator or Litigation Representative for the Estate of James D. Stewart (Deceased) and as Litigation Representative for Morgan Stewart, Jerome Development Limited, Bowen Family Properties Ltd., Ronald B. Pole, Kevin R. Pole, Danny G. Oneil in his capacity as Executor of the Estate of Mabel B. Oneil (Deceased), Robert Copley, Karen Nell Copley, Margaret Alice Demers, Mary Jean Biggar, Goldie Alberta Danielsen, Edna Keam, Wilma Marshall and Laurel Lee McLaren, Appellants Not Parties to the Cross-Appeal of Coastal Resources Ltd. Not Parties to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Plaintiffs) and 1088294 Alberta Ltd., Appellant Cross-Respondent to the Cross-Appeal of Coastal Resources Ltd. Cross-Respondent to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Plaintiff/ Defendant by Counterclaim) and J. Timothy Bowes, Appellant Not a Party to the Cross-Appeal of Coastal Resources Ltd. Cross-Respondent to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendant by Counterclaim) and TAQA North Ltd., Esprit Exploration Ltd., Bonavista Energy Corporation, and Triquest Energy Corp., Respondents Not Parties to the Cross-Appeal of Coastal Resources Ltd. Not Parties to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendants) and Coastal Resources Limited, Respondent/Cross-Appellant Not a Party to the Cross-Appeal of Nexen Inc. and ExxonMobil Canada Ltd. (Defendant/Plaintiff by Counterclaim) and Nexen Inc. and ExxonMobil Canada Ltd., Respondents/Cross-Appellants Not a Party to the Cross-Appeal of Coastal Resources Ltd. (Defendants/Plaintiffs by Counterclaim)

Patricia Rowbotham, J.D. Bruce McDonald, Brian O'Ferrall JJ.A.

Judgment: May 6, 2016
Docket: Calgary Appeal 1301-0360-AC

Proceedings: additional reasons to *Stewart Estate v. 1088294 Alberta Ltd.* (2015), 653 W.A.C. 201, 607 A.R. 201, [2016] 4 W.W.R. 20, [2015] A.J. No. 1227, 25 Alta. L.R. (6th) 1, 2015 CarswellAlta 2110, 2015 ABCA 357, Brian O'Ferrall J.A., J.D. Bruce McDonald J.A., Patricia Rowbotham J.A. (Alta. C.A.); additional reasons at *Stewart Estate v. 1088294 Alberta Ltd.* (2016), 2016 CarswellAlta 819, 2016 ABCA 143, Brian O'Ferrall J.A., J.D. Bruce McDonald J.A., Patricia Rowbotham J.A. (Alta. C.A.); reversing in part *Stewart Estate v. TAQA North Ltd.* (2013), 576 A.R. 57, 92 Alta. L.R. (5th) 141, 2013 ABQB 691, 2013 CarswellAlta 2414, B.E. Romaine J. (Alta. Q.B.)

Counsel: P.T. Linder, Q.C., S.B.G. Matthews, for Appellants and Appellants / Cross-Respondents
A.D. Grosse, for Respondent, Esprit Exploration Ltd. (now Pengrowth Energy Corporation)
R.C. Steele, for Respondent, Bonavista Energy Corporation
C.A. Crang, for Respondent / Cross-Appellant, Coastal Resources Limited

R.F. Steele, P.G. Chiswell, for Respondents / Cross-Appellants, Nexen Inc. and ExxonMobil Canada Ltd.

Subject: Civil Practice and Procedure; Contracts; Natural Resources; Property; Torts

ADDITIONAL REASONS to judgment reported at *Stewart Estate v. 1088294 Alberta Ltd.* (2015), 2015 ABCA 357, 2015 CarswellAlta 2110, 25 Alta. L.R. (6th) 1, [2015] A.J. No. 1227, [2016] 4 W.W.R. 20, 607 A.R. 201, 653 W.A.C. 201 (Alta. C.A.), regarding costs.

***Per curiam*:**

I. Overview

1 In our reasons for judgment reported as *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357 (Alta. C.A.) we invited the parties to make written submissions on costs if they were unable to agree. We have considered those submissions and our conclusions follow.

2 By way of introduction, the appellants (lessors and parties to whom the lessors "top-leased" their hydrocarbon rights) were successful in their appeal and in having the respondents' cross-appeal dismissed. The appellants and the cross-respondent, J. Timothy Bowes, claim costs and disbursements of $2,261,358.08, which includes trial and appeal costs. In brief, the appellants support their claim as follows: their unqualified success on appeal and cross-appeal; they were compelled to sue because of the respondents' tortious conduct and the litigation is ten years and counting; the suit was complex and they were pursuing five respondents each with a different approach to defending the claims against them at trial and on the appeal; the respondents' proposed bill of costs for the trial alone was 50% more than the appellants' claim for trial and appeal; the appellants bested a formal offer of $18 million made before trial; and there were three informal offers, two before the appeal, all of which were bested. The appellants request that we determine trial costs.

3 The respondent-lessees contend that each party should be responsible for its own appeal costs given what they characterized as novel issues, and trial costs should be remitted back to the trial judge for determination. More specifically, the respondents contend that this court should exercise its discretion and award no costs on appeal because the lawsuit is a "leading case in oil and gas law" as it addressed important industry-wide issues for the benefit of oil industry participants and freeholder interest holders. In the alternative, a much reduced award is appropriate. They contend that the following consideration militates against the respondents paying the appellants' costs: the lessors would be over-indemnified because they were never responsible for costs as a result of an agreement with a non-party (the top lessee) and a retainer agreement with their counsel. The respondents contend that trial costs are on reserve by the trial judge and should be decided by her (not by this court). They say the appellants pursued unmeritorious collateral issues at trial and used objectionable expert witness tactics. Coastal Resources Limited and Bonavista Energy Corporation submit that they are both in a unique position because of the time when they were added as parties and the fact that their legal relationship was arguably with a non-party (Snell Farms Ltd. and Wheatland Farming Company Ltd.). Esprit Exploration Ltd. also distinguishes itself from the other respondents because its liability (disgorgement of gross royalties) is arguably of a different nature.

4 A Consent Order of this court on April 9, 2014 directed that TAQA North Ltd. would have no monetary liability to the appellants, including liability for costs incurred prior to April 9, 2014 or from the appeal.

II. Analysis

5 This section addresses whether this court should determine trial costs or remit them back to the trial judge for determination; what factors govern the award of costs in this litigation; whether Bowes is entitled to costs and, if so, in what amount; whether Esprit's special circumstances warrant different costs; the effect of the informal and formal offer made before trial and the informal offers made thereafter; and whether the respondents (other than Esprit) should be held jointly and severally liable or liable pro rata commensurate with damages.

A. Should this Court determine trial costs or remit them back to the trial judge for determination?

6 Written submissions about trial costs were made to the trial judge and her costs decision is reserved.

7 The appellants submit that because the issues before the trial judge were the same as those before this court, we are in a position to award trial costs and doing so would be timely and cost-effective.

8 Bonavista Energy Corporation contends that the trial costs should be determined by the trial judge since there are unique aspects of the trial that the trial judge is best positioned to quantify. Nexen Inc. and ExxonMobil Canada Ltd. take the same position and say the trial judge is uniquely positioned to decide trial costs, she is seized and her decision is reserved. They make specific claims about the appellants' trial conduct which they contend warrant special consideration. Coastal also submits the trial judge should decide trial costs but in the event this court determines costs, it argues that "grossly excessive costs" are being claimed.

9 This court has determined trial costs in the past when the appellant was successful on appeal. The appellants cited *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 116 (Alta. C.A.) at paras 5-6, 87 Alta LR (5th) 108 as an example, although the issue of the appropriateness of this court setting trial costs when the trial judge had already embarked on a process for setting the same was not discussed in that case. The respondents' authorities cited for the proposition that we ought to remit the issue of trial costs to the trial judge are also distinguishable because in both cases cited the appeal was dismissed: *Delta Hotels Ltd. v. Okabe Canada Investments Co.*, 1992 ABCA 176, 3 Alta. L.R. (3d) 85 (Alta. C.A.) and *Globex Foreign Exchange Corp. v. Kelcher*, 2011 ABCA 240, 48 Alta. L.R. (5th) 215 (Alta. C.A.).

10 We conclude that it will be less costly and more expeditious for all parties if this court determines trial costs. If we were to remit the matter of costs to the trial judge, her decision might be appealed (with leave) and this court could be called upon to assess trial costs in any event.

B. What factors govern the award of costs in this litigation?

11 As noted above, the respondents' position is that each party should bear its own costs. We reject that position: the appellants were successful on appeal and the factors that would militate against costs do not arise on this appeal nor, in our view, did they arise at trial.

12 That leaves the question of whether we should exercise our discretion to award enhanced costs, i.e., costs above the tariffs prescribed by Column 5.

1. Costs Submissions Made After Trial

13 The appellants justify their position in part because they seek "costs on the same multiplier, and for the same items, and with the same lump sum components" as the respondents sought after trial. However, reliance on the trial submissions is a double-edged sword: the appellants strenuously argued in their submissions to the trial judge that the respondents were only entitled to very modest costs. They emphasized in those submissions that the proceedings "were efficient and in the best tradition of the adversarial process" and noted the "extensive cooperation between counsel that enabled ... efficiency" at trial and in pre-trial proceedings. They said "it was a testament to the cooperation and efforts of counsel on both sides" that the trial was expeditious and "this efficiency ... should be reflected in a lower costs assessment" against them.

14 The respondents' arguments about costs are similarly contradictory: after their success at trial they sought significant costs but now they contend only a modest award or no costs are appropriate. The respondents attempt to distinguish their previous position on the basis that no such award was granted and there were other factors that led to those submissions.

15 Given these contradictions, we give little weight to the parties' post-trial justifications for costs.

2. Multiplier of Column 5 Tariffs

16 Costs are governed by Schedule C: Tariff of Recoverable Fees, *Alberta Rules of Court*, Alta Reg 124/2010. The quantum of damages claimed exceeds $1.5 million therefore Column 5 applies.

17 Rule 10.33 of the *Rules* provides a list of factors a court may consider when determining costs. They include the degree of success, the amount claimed and recovered, the importance of the issues, the complexity of the action, and conduct that shortened proceedings. Costs may be denied when conduct unnecessarily lengthened proceedings or there was misconduct. After considering the foregoing factors, reasonable and proper costs may be awarded in "any amount that the court considers to be appropriate in the circumstances" including full indemnity or lump sums: Rule 10.31.

18 On the issue of trial costs, the appellants submit that the action's complexity (volume of documents, days of questioning, agreed exhibits, number of lay and expert witnesses and volume of written arguments) support a four times multiplier of the tariff amounts in Column 5. The respondents argue that no multiplier should be used.

19 Factors cited by the appellants to support the four times multiplier to the tariffed items for the appeal are that they were responding to five counsels' submissions on behalf of five respondents, the issues were complex and varied, the appeal hearing was two days in length and they achieved success on virtually all the grounds of appeal.

20 Bonavista favours no costs or a reduced award because of the novel nature of the issues. It submits the court should not encourage parties "such as these Plaintiffs" (presumably referring to the top lessees) to "interfere with long standing commercial relationships". In any event, they say at most tariffed Column 5 costs are appropriate because "all" multiples cases "involve egregious conduct on the part of the unsuccessful party, which conduct is absent". That is an overstatement as the cases set out in Appendix 1 demonstrate.

21 Bonavista objects to the "sweeping" nature of the appellants' submissions. It notes that some of the appellants' justification for enhanced costs is based on allegations that do not apply to Bonavista since it acquired its assets in January 2004 and Bonavista knew nothing about the well's history. By then the 7-25 well had resumed production and Bonavista believed it had contractual royalty obligations to Snell/Wheatland, and paid more than $1.5 million in royalties from 2001 to 2011 on the basis of this belief. Among other things, this respondent also notes that it did not receive a Notice to Vacate and was first served in 2006. Similar submissions are made by Coastal.

22 The record does not support Bonavista's submissions. In January 2004 Bonavista acquired all of the shares of Triquest Energy Corp. It was Triquest which had served the independent operations notice on Nexen, the operator of the 7-25 well. This initiated the wrongful production at issue in this case. When Bonavista acquired Triquest, it would be deemed to have acquired Triquest's knowledge. Prior to its acquisition of Triquest in 2004, Triquest's files would have revealed that the 7-25 well had not been produced in years and that it was Triquest which took action to get the well back on production. There is no merit to Bonavista's submission that it knew nothing about the well's history. The company it acquired knew the history only too well. Likewise, the record does not support Coastal's submissions. Coastal's predecessor-in-title, Unocal, was served with the Notice to Vacate in the Fall of 2005 because Coastal had failed to register its interest on title and Coastal was advised of the litigation in December of 2005.

23 Nexen and ExxonMobil raise the issue of the lessors' indemnification by the top lessee and argue that since the lessors incurred no liability for costs, any award would be a windfall and contrary to the purpose of a costs award, namely partial indemnification of costs actually incurred. Although their primary submission is that any award over-indemnifies the appellants, if this court is not persuaded of that, Nexen and ExxonMobil argue that the most that should be awarded is a lump sum of $70,000, about two times Column 5, the same scale this court awarded in *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2006 ABCA 260 (Alta. C.A.), 3 Alta. L.R. (6th) 302. We question Nexen and ExxonMobil's suggestion that $70,000 in costs would be roughly two times Column 5. We would have estimated two times Column 5 as being more like $200,000.

24 Application of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million: *Nexxtep Resources Ltd. v. Talisman Energy Inc.*, 2012 ABQB 708 (Alta. Q.B.) at para

24, (2012), 77 Alta. L.R. (5th) 16 (Alta. Q.B.) (three times Column 5 and no misconduct); *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.) at paras 39-40, (2013), 561 A.R. 50 (Alta. C.A.) (four and five times Column 5 for incessant misconduct).

25 An appendix of cases that have discussed multipliers is attached. To summarize, Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the complexity of the action warrants it, when the amount in dispute significantly exceeds the $1.5 million threshold for Column 5 or when the conduct of one of the parties warranted a multiplier. However, generally, courts also rely upon the other considerations set out in Rule 10.33 in determining whether a multiplier should be applied. There is nothing in the cases surveyed to suggest that the analysis for applying a multiplier differs in an oil and gas context.

26 Since a costs award is ultimately at the discretion of the judge, there is little in the way of a uniform basis upon which a multiplier is awarded or declined. It is highly dependent on the unique facts and circumstances of each case. However, a general principle arising from the case law is that the discretion to grant costs must be exercised judicially, and in line with the factors in Rule 10.33. Additionally, in actions where the amount in dispute greatly exceeds Column 5, there is a general recognition that Schedule C is deficient, and that a multiplier may be applied. However, courts are careful to avoid awarding a multiplier that would result in the over-indemnification of a successful party.

27 The leading oil and gas case from this court is *Freyberg*. The appellant sought a declaration that a freehold petroleum and natural gas lease had terminated, as well as an accounting of the proceeds of production from that well. This court awarded a two times multiplier for the trial and the appeal. A two times multiplier when damages were in the range of $25M was also awarded in *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304, 259 A.C.W.S. (3d) 247 (Alta. C.A.). This was an action to recover damages resulting from the diversion of water, which created remediation costs and delays in developing land.

28 Having considered the factors in Rule 10.33, especially the trial's complexity (volume of documents, days of questioning, agreed exhibits, number of lay and expert witnesses and volume of written arguments) and the complexity of the appeal (five respondents, the issues were complex and varied and the appeal hearing was two days in length), we award a two times multiplier.

3. Lump Sums

29 Rule 10.31(1)(b)(i) provides that "a lump sum instead of or in addition to assessed costs" may be ordered. The appellants contend that lumps sums are appropriate for both the trial and the appeal because of the complexity, duration, number of submissions to which they were required to respond and the quantum in issue. They claim lump sums of $100,000 for the trial and $50,000 for the appeal.

30 In our view, the factors cited by the appellants as justifying lump sums are the same factors that we considered and applied to award the two times multiplier. Accordingly, it would be duplicative to consider those factors and we decline to award any lump sums.

C. Counterclaim Costs Claimed by Bowes (Trial Only)

31 Bowes claims a separate set of trial costs on Column 4 (the counterclaim sought damages of a minimum $600,000 from Bowes and the numbered company, 1088924 Alberta Ltd.) doubled from date of the formal offer, December 29, 2011. He does not seek a multiplier or appeal costs.

32 Bowes was instrumental in the lessors' signing the top leases but was not a party to the proceedings until he was made a party by the counterclaim of Nexen and ExxonMobil. The counterclaim focused on a champerty and maintenance claim, which was rejected by the trial judge and by this court.

33 Bowes submits that his costs submission mirrors those proposed by the respondents after trial but as mentioned earlier, this argument carries little weight.

34 Nexen/ExxonMobil argue that a separate set of costs for Bowes is not justified. He was represented by the same lawyers who represented the other appellants at trial, few trial submissions addressed the claims against Bowes and there were no

witnesses, evidence or documents specifically dedicated to the counterclaim. In short, only costs which are truly incremental should be recoverable and there were "virtually none" with respect to that counterclaim.

35 Coastal submits that if any costs are awarded, they should be 100% payable by Nexen/ExxonMobil, who instituted the proceedings against Bowes.

36 We agree that Nexen/ExxonMobil should be solely responsible for these costs, and we agree with Nexen/ExxonMobil's submissions that the $181,650 in costs claimed by Bowes to defend their counterclaim was excessive. However, the issue raised by the counterclaim, champerty, required preparation which was not entirely subsumed in the preparation of the main case. Bowes' personal exposure was $600,000.

37 In our view, Bowes is entitled to costs and we award a lump sum of $50,000 for trial preparation and trial for which Nexen and ExxonMobil are jointly and severally responsible. The effect of offers made on his behalf is discussed later in these reasons.

D. Esprit

38 This court concluded that Esprit's liability to the appellants differed from that of the other respondents. The entire court held that Esprit was not jointly and severally liable with the working interest owners. Esprit's submission is that the foregoing means the appellants were "wholly unsuccessful" in their claim against Esprit and therefore no appeal costs should be awarded against it.

39 We reject Esprit's submissions in this regard. In the final analysis, although Esprit was not held liable for the value of all of the natural gas wrongful produced from the 7-25 well, it was found liable for the overriding royalties it received. Esprit resisted the claim for disgorgement of the overriding royalties. The appellants were not wholly unsuccessful in their claim against Esprit.

40 As regards trial costs, Esprit submits that there should be an apportionment between Esprit and the appellants. It is prepared to pay costs specifically relating to it and for its pro rata share of common costs. However, its position is that it "should never have been dragged through a lengthy trial ... facing joint and several liability". In any event, its maximum liability is tariffed Column 4 costs because at most, its damages are below the Column 5 minimum of $1.5 million (i.e., $1,357,703.68). Esprit submits that because it is not jointly and severally liable for damages with the other respondents, it would not be appropriate for it to have to negotiate terms with the others without guidance from this court.

41 The appellants' bills of costs for trial and appeal do not differentiate among the respondents. They contend that the damages payable by Esprit exceed Column 5's minimum when prejudgment interest of over $200,000 is added to damages of $1,357,703.68. The appellants say this entitles them to costs on Column 5.

42 Esprit's situation is different from those of the other respondents in that it was merely the recipient of a portion of the value of the natural gas wrongfully produced by the working-interest owners. Its liability lay in the law of personal property (a person cannot acquire better title to a chattel than that of the person from whom it received the chattel), not in the law of torts. Esprit also argued that costs against it ought to be pro rated to the judgment obtained against it. On that basis, we have determined Esprit's liability for costs as follows: trial costs are $45,000 and appeal costs are $5,000. This assessment of costs also reflects a reduction in the cost we might otherwise have ordered for the fact that Esprit was successful in arguing that it was not jointly and severally liable for the wrongful production by the working-interest owners. As a consequence, Esprit's liability for costs shall be deducted from the total amount of costs awarded.

E. Offers

43 The appellants' formal offer of December 29, 2011 specified that it was made to the "defendants and plaintiffs by counterclaim" which at that time were TAQA North Ltd., Nexen, ExxonMobil, Esprit, Bonavista, Triquest and Coastal.

44 The informal offers which followed were not specific but reference is made to "the Defendants" so one can reasonably infer that this encompasses all the respondents.

1. Trial-related Offers

45 In May 2009 (prior to January 11, 2012, the date the trial commenced) the appellants made an informal offer of $10.5M. They followed that with a formal offer of $18M in December 2011, again prior to trial. Given that their success on appeal led to an award greater than the formal offer, the appellants contend that this entitles them to double costs from the date of the formal offer, December 29, 2011.

46 In their costs submissions, Bonavista and Coastal argue that despite the offers of settlement they were compelled to continue producing because they owed a duty to their lessors who at that point had not told them to vacate and who were not parties to the litigation. In making that argument, Bonavista and Coastal misunderstood the effect of the pooling which was required in order to constitute a legal production spacing unit. Bonavista and Esprit, like the other lessees, had no right to produce as soon as any one of the lessors withdrew their consent to continued production. If one lease in a pooled production spacing unit is terminated, the remaining leases do not necessarily terminate; but production must cease. The remedy of owners of tracts who wish their hydrocarbons produced in the face of a tract owner who does not wish them produced is to apply to the energy regulator for a compulsory pooling order. Their remedy is not to continue producing the well.

47 Bonavista and Coastal also argue the fact they were compelled to defend their leases in the absence of a Notice to Vacate by their putative lessors (there being a dispute as to who their lessors were) ought to be a factor in reducing or eliminating cost awards against them. Their argument, once again, was that they were obliged to continue producing. This argument is not persuasive. If Bonavista (through its operator, Nexen) had ceased production, its lessors could have no complaint. There is no obligation upon the lessee under a natural gas lease to produce the leased substances. Leaving the lessors' molecules in the ground is not actionable. It might cause a lessee to lose its lease. But there would be no requirement on the lessee to account to its lessor for not producing. However, producing molecules which one has no right to produce (which is the situation as soon as one owner of a tract in a pool properly withdraws his or her consent to production) triggers the obligation to account to the owner for that production.

48 In conclusion, there is no reason to deny the appellants, including Bowes, the costs consequences of besting their offer. Accordingly, trial costs from the time of the formal offer, December 29, 2011, are doubled.

2. Appeal-related Offers

49 Before the appeal was heard, the appellants made two informal offers of $2.957M (July 2014) and $5.525M (August 2014). They are already bested.

50 The appellants contend that this entitles them to double costs of the appeal hearing. They cite *Mahe v. Boulianne*, 2010 ABCA 74 (Alta. C.A.) at para 10, 505 A.R. 168, which held that informal offers "can have an effect on costs" and are a relevant consideration when a court exercises it discretion on costs. (We note parenthetically that the Rules Committee has requested input on this topic which may or may not lead to future rule changes.)

51 Nexen/ExxonMobil rely on Rule 4.24 which requires that formal offers must use Form 22, specify certain information and be open to acceptance (i.e., unconditional), all of which are lacking in informal offers. They contend that the appellants' informal offers were conditional on the freeholders' approval and therefore mere invitations to treat.

52 The July 16, 2014 offer to the respondents began as follows: "I now have instructions from my instructing client group to seek to resolve" the litigation. The letter proposed that "all parties enter into a formal settlement agreement to resolve this matter in its entirety on substantially the following terms...". The letter also stated that if "this offer is acceptable to your clients, I will need each of the Freeholders to confirm their agreement to its terms. However, my understanding is that this will not be an issue and that such confirmation will be forthcoming." An expiry date was provided.

53 Counsel's letter of August 26, 2014 noted that he had "instructions from my instructing client group to advance a further offer" and if "this offer is acceptable, I will need final approval from each of the Freeholders, but I expect that this will be readily forthcoming". An expiry date was provided.

54 These informal offers were conditional but there is every indication that acceptance by the respondents would have led to approval by all of the appellants. In our view, these informal offers were a sincere attempt to settle the dispute without the need for a lengthy appeal hearing. Accordingly, we allow a doubling of the costs of the appeal hearing (the only step taken after the offers).

F. Liability - Joint and Several or Pro Rata in Accordance with Damages

55 The appellants submit that costs should be awarded against all of the respondents jointly and severally, leaving apportionment to them.

56 As noted above, we have already made an exception for Esprit for all but the overriding royalty volumes.

57 Coastal suggests that if costs are awarded they should not be awarded against all of the respondents jointly and severally. More specifically, Coastal should be liable for reduced or single Column 5 costs attributable to it. Costs and disbursements common to all the respondents ought to be allocated pro rata in proportion to the damages payable by each respondent. Coastal also distinguishes itself from the other respondents: it is a small privately held company which dealt with Snell/Wheatland as lessors. It was not added as a defendant until June 2006. It also notes that many of the statements made in the appellants' brief about the respondents' conduct before and during trial are simply not applicable to Coastal.

58 We have found the respondents (other than Esprit) jointly and severally liable for the damages. We see no principled basis upon which to make liability for costs any different. It is open to the respondents to determine among themselves the portion of costs for which each is responsible but this ought not to be the appellants' responsibility.

59 We direct that after deducting the Esprit amounts in accordance with our direction in the section above, the remaining respondents including Coastal are jointly and severally liable for the balance.

III. Conclusion

60 Costs related to the Bowes' trial costs have been set out above at para 37. Bowes is also entitled to double costs for trial preparation and trial which means he is entitled to $100,000 in costs. Costs related to the appellant-lessors' trial and appeal costs are set out below. Esprit's costs liability, $100,000 when doubled for the bested offers, shall be deducted from the amounts set out below. What remains after that deduction shall be the joint and several liability of the remaining respondents. So, with respect to recoverable fees, we would approve a Bill of Costs as follows:

Item #	*Item description*	*Tariff Amount*	*Multiplier of two*	*Formal offer*
1(1)	Commencement documents	3,500	7,000	--
3(1)	Disclosure	1,500	3,000	--
3(2)	Review of opposite party documents	7,500	15,000	--
5(1)	Preparation for Questioning	1,500	3,000	--
5(2),(3)	Questioning	48,500	97,000	--
7(1)	Contested application	1,500	3,000	6,000
9(1)	Trial readiness and case management (three meetings)	3,000	6,000	--
10(1)	Trial preparation	10,000	20,000	40,000
11	Trial	113,250	226,500	453,000
12	Written argument - brief, reply brief and costs submissions	15,000	30,000	60,000
Total Trial Costs		*$205,250*	*$410,500*	*$690,000*

18	Notice of Appeal and speak to list	600	1,200	--
19	Prep (factum, reply factum, other)	20,000	40,000	--
20	First half day appearance for two counsel	4,500	9,000	18,000
21	Each full half day appearance (x3) with second counsel	7,200	14,400	28,800
22	Contested application	2,500	5,000	--
Total Appeal Costs		*$34,800*	*$69,600*	*$93,000*

61 With respect to entitlement to and liability for these recoverable fees, the following may be of assistance to the parties:

Entitlement to Recoverable (Scheduled "C") Fees

Appellant-Lessors	$783,000 (from the respondent-lessees and Espirt)
Bowes	$100,000 (from Nexen and ExxonMobil)
Esprit (solely)	$100,000
Bonavista (jointly and severally with the other lessees)	$683,000
Coastal (jointly and severally with the other lessees)	$683,000
Nexen and ExxonMobil (jointly and severally with the other lessees)	$683,000
(jointly and severally with each other)	$100,000

62 We also received submissions questioning and contesting some of the appellants-lessors' disbursements. The reasonableness of some of the disbursements, as well as the liability of some of the respondents to pay them, was questioned. We would adopt with the submission of Nexen and ExxonMobil who suggested that disputed disbursements should be reviewed by an assessment officer who can properly assess the reasonableness of such disbursements in light of the appellant-lessors' reasons for incurring same and in light of their supporting documentation. Armed with that information, the assessment officer should also be in a position to assess whether liability for any particular disbursement ought to be attributable to a specific respondent. We would therefore direct that an assessment officer assess the disbursements sought to be recovered in accordance with the rules governing the assessment of such costs.

63 We thank the parties for their submissions; but there will be no costs awarded for the costs incurred by any of them in connection with this assessment of costs by the court.

Order accordingly.

Appendix 1 — Multiplier Cases

Case	*Nature of the Dispute*	*Damages Sought*	*Bad Conduct Justifying Multiplied Costs?*	*Multiple Applied*
RVB Managements Ltd v Rocky Mountain House (Town), 2015 ABCA 304, 259 ACWS (3d) 247.	Action to recover damages resulting from the diversion of water, which created remediation costs and	$25 million	None	2 Column 5 after amendment of claim.

	delays in developing land.			
Hill v Hill, 2013 ABCA 313, 3 Alta LR (6th) 302.	Dispute over alleged appointment of shares held by a discretionary trust.	$17.5 million, plus disgorgement of profits or income over 30 years.	Incessant misconduct by the plaintiff, rooted in a host of grave but unfounded allegations of misconduct and serious impropriety he made about the defendants: paras 19, 52.	4 Column 5 for first part of trial.
				3 Column 5 for second part.
Freyberg v Fletcher Challenge Oil & Gas Inc, 2006 ABCA 260, 397 AR 235.	Appellant sought a declaration that a freehold petroleum and natural gas lease had terminated, as well as an accounting of the proceeds of production from that well.	Not determined, but set at Column 5.	None	2 Column 5 (for the trial and the appeal)
Shefsky v California Gold Mining Inc, 2015 ABQB 525, 258 ACWS (3d) 491.	Oppression action brought pursuant to a dispute over control of a corporation's board of directors by an investor.	No monetary relief sought, but Thomas J awarded costs under Column 5: paras 19-20.	Alleged that the applicants improperly delayed serving notice of the application, resulting in increased costs: para 9. Thomas J. rejected this submission: paras 30-33.	None
Blaze Energy Ltd v Imperial Oil Resources, 2014 ABQB 509, [2014] AJ No 916.	Parties co-owned a gas plant and parcel of land. The sale of one party's interest was alleged to violate the other party's right of first refusal.	Interference with transactions worth $968 million.	Allegations of bad faith and misconduct during the litigation were made, but not relied upon by the trial judge: paras 16, 21, 34, 84.	1.5 Column 5
Cogent Group Inc v EnCana Leasehold Limited Partnership, 2014 ABQB 593, 13 Alta LR (6th) 166.	Claim for breach of contract arising out of the termination of a contract to provide services relating to the construction of an office tower.	$1,057,426	Unsuccessful party alleged that the successful party had acted in an egregious and high-handed manner: para 17.	None
321665 Alberta Ltd v ExxonMobil Canada Ltd, 2012 ABQB 76, 529 AR 276	Anti-competitive behaviour contrary to section 36 of the Competition Act in relation to oilfield fluids hauling.	Damages of $5 million awarded, with $1 million in punitive damages.	None	3 Column 5
Bhasin v Hrynew, 2012 ABQB 427, 72 Alta LR (5th) 16	Dispute arising out of the interpretation of a clause in a standard form contract and the breach of an implied term of good faith.	$455,064 in damages awarded.	Allegation that the defendants excessively delayed the proceedings up to trial, but this was rejected by the trial judge: paras 10, 14.Column	4 (for questioning, trial time and trial preparation)

			Trial judge did, however, take into account the defendants' failure to provide material documents: para 15. Trial judge also considered the defendants misconduct prior to the litigation: paras 16-20.	
Nexxtep Resources Ltd v Talisman Energy Inc, 2012 ABQB 708, 77 Alta LR (5th) 16	Dispute arising from the purchase of petroleum and natural gas rights in certain formations. Issue related to a well producing from the wrong pool.	Not specified (sufficient for column 5).	Court declined to elevate costs due to allegations of bad conduct: para 28.	3 Column 5
Eaton v HMS Financial Inc, 2010 ABQB 364, 486 AR 131	Application with respect to funds held as fruits of an alleged Ponzi scheme.	Approximately $5 million USD.	Defendants took an unreasonable position with no discernable merit that warranted multiplied costs as a deterrent: paras 17-20.	3 Column 5 (but only for Item 7).
Marathon Canada Ltd v Enron Canada Corp, 2008 ABQB 770, 447 AR 89	Nonpayment under a natural gas purchase agreement.	Claim for $506,007.94, counterclaim for $126 million.	None	3 Column 5
Klemke Mining Corp v Shell Canada Ltd, 2007 ABQB 427, [2007] AJ No 693	Breach of contract claim arising out of an agreement relating to mining and consulting work for a project in the Athabasca oil sands.	$22,005,122 in damages awarded.	None	2 Column 5

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TAB – 4

Most Negative Treatment: Check subsequent history and related treatments.

2019 ABCA 92
Alberta Court of Appeal

Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH

2019 CarswellAlta 422, 2019 ABCA 92, [2019] A.W.L.D. 1698, [2019] A.W.L.D. 1701, [2019] A.W.L.D. 1702, [2019] A.W.L.D. 1708, [2019] A.W.L.D. 1709, 304 A.C.W.S. (3d) 270, 84 Alta. L.R. (6th) 33

Weatherford Canada Partnership (Appellant / Cross Respondent / Plaintiff) and Artemis Kautschuk und Kunstoff-Technik GmbH and Wilhelm Kaechele GmbH (Respondents / Cross-Appellants / Defendants) and Dave Addie, David Anderson, Glen Kinnee, Ted Harland, Dan Endersby, Midfield Supply ULC, Midfield Supply International Ltd., Dale Denney, Douglas Golledge, John Letwinetz, Rick Endersby, Jakob Ambrosius, West Met Tools & Machinery Ltd. and Europump Systems Inc. (Not Parties to the Appeal/Cross-Appeal / Defendants)

Peter Costigan, Jo'Anne Strekaf, Ritu Khullar JJ.A.

Heard: March 6, 2019
Judgment: March 12, 2019
Docket: Edmonton Appeal 1803-0240-AC

Proceedings: affirming *Weatherford Canada Partnership v. Addie* (2018), 26 C.P.C. (8th) 311, 2018 ABQB 571, 2018 CarswellAlta 1501, 75 Alta. L.R. (6th) 248, D.L. Shelley J. (Alta. Q.B.); additional reasons to *Weatherford Canada Partnership v. Addie* (2016), 2016 CarswellAlta 617, 2016 ABQB 188, J.B. Veit J. (Alta. Q.B.)

Counsel: C.G. Jensen, Q.C., A.G. MacGregor, for Appellant / Cross-Respondent
K.W. Fitz, K.M. Whittleton, for Respondent / Cross-Appellant, Artemis Kautschuk und Kunstoff-Technik GmbH
S.A. Jacob, R.M. Smith, for Respondent / Cross-Appellant, Wilhelm Kaechele GmbH

Subject: Civil Practice and Procedure

APPEAL by plaintiff and cross-appeal by defendants from judgment reported at *Weatherford Canada Partnership v. Addie* (2018), 2018 ABQB 571, 2018 CarswellAlta 1501, 75 Alta. L.R. (6th) 248, 26 C.P.C. (8th) 311 (Alta. Q.B.), regarding costs.

***Per curiam*:**

1 This is an appeal and cross-appeal of an award of costs in favour of two defendants by a case management judge in a complex, protracted commercial litigation where damages of over $290 million were sought against all of the defendants jointly and severally. Costs decisions are highly discretionary and will not be interfered with lightly. They should not be set aside on appeal unless the judge below made an error of principle or the award is plainly wrong: *Bun v. Seng*, 2015 ABCA 165 (Alta. C.A.) at para 5, [2015] A.W.L.D. 2588 (Alta. C.A.), citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (S.C.C.) at para 25, [2004] 1 S.C.R. 303 (S.C.C.).

Background

2 Weatherford Canada Partnership (Weatherford) is a manufacturer of a particular type of cavity pump used in the oil and gas industry. A key component of the pumps, a steel tube called a stator, was manufactured and sold to Weatherford by Artemis Kautschuk und Kunstoff-Technik GmbH (Artemis) and by Wilhelm Kaechele GmbH (Kaechele). In 2005 Weatherford learned that two of its senior executives were leaving in order to start a competing business. On April 11, 2006, Weatherford issued

a statement of claim against them and other defendants. On April 7, 2008, the statement of claim was amended to include Artemis and Kaechele.

3 A key issue in this litigation is the late production of a November 25, 2005 email from Lonnie Dunn, an employee of Weatherford, to his superiors setting out his thoughts for a strategy to deal with the departing employees. The email discusses the likelihood that Artemis and Kaechele were assisting the departing employees by supplying stators to their new company. The email then discusses a strategy for how Weatherford should continue to deal with Artemis and Kaechele to ensure a supply of stators to Weatherford, at the same time as Weatherford was setting up another supply chain in Brazil. Weatherford had claimed that this email was privileged.

4 On May 2, 2014, more than eight years after the litigation started and six years after Artemis and Kaechele were added, the case management judge ordered Weatherford to produce the email to the defendants. In January 2016, as a result of the production, Artemis and Kaechele applied to amend their defences to include a limitations defence and to summarily dismiss the claims against them based on the limitations defence. Their summary dismissal applications were successful (*Weatherford Canada Partnership v. Addie*, 2016 ABQB 188 (Alta. Q.B.)) and upheld on appeal (*Weatherford Canada Partnership v. Kautschuk*, 2017 ABCA 110 (Alta. C.A.)). The Supreme Court denied leave to appeal: *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH, et al.* [2017 CarswellAlta 2549 (S.C.C.)], 2017 CanLII 80433.

5 In the summary dismissal application, the Court of Queen's Bench held that the November 2005 email was "the key evidence" to determining the limitation period. It observed:

> Weatherford is a sophisticated litigant. As the November 25, 2005 email makes clear, as of that date Weatherford understood that it had a decision to make about whether and when it would sue the applicants [Artemis and Kaechele]. If it did sue the applicants, Weatherford believed that it had to take the risk that the applicants would not continue to supply Weatherford with stators; that would have effected a commercial detriment to Weatherford. . . . If it did not sue the applicants in November 2005, it could hope to maintain supply from the German applicants until Weatherford had replicated the German stators and was in a position to, itself, provide the 'exact same pump' . . . That was of course the kind of choice which Weatherford was entitled to make. . . . What is decisive here is that Weatherford chose not to comply with a known limitation period and to sit on their rights.
>
> *Weatherford Canada Partnership v. Addie*, 2016 ABQB 188 (Alta. Q.B.) at paras 151-152

Decision Below

6 The crux of the reasons for the case management judge's decision on costs was as follows:

> Therefore, I would characterize Weatherford's conduct as misconduct in the sense that Weatherford, either erroneously or improperly, claimed privilege and strategically delayed commencing the Action against Artemis and Kaechele to maximize its own long term benefit. Similarly, I would characterize Weatherford's conduct as misconduct in the sense that it commenced and continued a lawsuit against Artemis and Kaechele when it had in its possession documents which made it clear that it had brought its action out of time. Weatherford's conduct did not involve fraud, a breach of trust, an abuse of process, breached undertakings, ever-evolving claims, or the making of baseless allegations of dishonesty and misconduct. However, there is an aspect of outrageousness, in that Weatherford commenced and continued a complex and expensive lawsuit against two parties when it was in possession of documents that should have alerted it to the fact that its time for doing so had expired. While Weatherford's conduct warrants deterrence, I would not place it on the upper end of the scale of misconduct that justifies an indemnity of costs, but conclude that enhanced costs aimed at deterring such conduct are warranted.
>
> *Weatherford Canada Partnership v. Addie*, 2018 ABQB 571 (Alta. Q.B.) at para 68, (2018), 75 Alta. L.R. (6th) 248 (Alta. Q.B.) (Reasons)

7 The case management judge ordered party and party costs based on column 5 of Schedule C of the *Alberta Rules of Court*, Alta Reg 124/2010 (the *Rules*) with a multiplier of 2.5 to Artemis and Kaechele for the period after the email was disclosed in May 2014. It is not uncommon for trial judges to award a multiple of column 5 costs for various reasons, such as the amount and complexity of the claim: *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.) at para 13, (2015), 609 A.R. 55 (Alta. C.A.) (*Rocky Mountain House*). While the appellant does not dispute this award, Artemis and Kaechel argue in their cross-appeals that this amount should have been higher.

8 The main contested issue is the award of costs from the start of the litigation against Artemis and Kaechele in April 2008 until the disclosure of the November 2005 email in May 2014. The case management judge awarded enhanced costs based on column 5 of Schedule C of the *Rules* with a multiplier of 4 to reflect Weatherford's failure to produce the highly relevant November 2005 email and for commencing and continuing the litigation when it should have known that there were limitation issues.

9 Weatherford appeals this decision, arguing that the case management judge erred in principle in making findings of misconduct against Weatherford when there was no misconduct. It also submits that no one argued misconduct before the case management judge and that she specifically precluded Weatherford from addressing any submissions on misconduct when she said to counsel for Weatherford "And you're not facing that [misconduct allegations]" (Transcript, 28/14).

10 Artemis and Kaechele cross-appeal, arguing that given the findings of the case management judge on misconduct, an increase of the costs award is warranted. While Artemis and Kaechele each put forward different alternative scenarios, their positions can be summarized as seeking full indemnity costs for the entire litigation, or at least from the beginning of the litigation until May 2014. In addition, the cross-appeals argue that the costs for the period after May 2014 should be at least based on column 5 of Schedule C with a multiplier of 4.

Analysis

11 The discretion to award costs must be exercised judicially and in line with the factors in r 10.33: *Stewart Estate v. 1088294 Alberta Ltd.*, 2016 ABCA 144 (Alta. C.A.) at para 26, (2016), 35 Alta. L.R. (6th) 1 (Alta. C.A.). The general rule is that costs are awarded on a party and party basis, and that this should represent partial indemnification of the successful party — approximately 40-50% of actual costs: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.) at para 20-21, (1999), 251 A.R. 101 (Alta. Q.B.); *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.) at para 68, [2014] A.J. No. 916 (Alta. Q.B.) (QL).

12 Party and party costs balance two competing interests: the unfairness of requiring a successful party whose conduct is not blameworthy to bear any costs and the chilling effect on parties bringing or defending claims if the unsuccessful party is required to bear all the costs: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para 5, (2001), [2002] 4 W.W.R. 531 (Alta. Q.B.) (*LSI Logic*). The result of this balance is the concept of partial indemnification through party and party costs to the successful party.

13 While costs are always in the discretion of the court, the cases recognize that when the litigation is complex and the amount at stake in the action in dispute greatly exceeds column 5, courts may award a multiplier of column 5 to help achieve the level of indemnification appropriate for party and party costs: *Rocky Mountain House* at para 13. To do so is not an error in principle.

14 An award of solicitor and client costs will be rare and must be based on a finding of *intentional* misconduct during the litigation. *LSI Logic* at paras 5-6; *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at para 75, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.) (*Luft*). Solicitor and client costs indemnify for costs that arise within the four corners of the litigation. Full indemnification costs, also known as solicitor and own client costs, compensate for services that are not strictly essential to the litigation. *LSI Logic* at para 4; *Luft* at para 77. They are "virtually unheard of" except when provided for by contract: *Luft* at para 78.

15 This case turns on a characterization of the case management judge's conclusions about Weatherford's conduct in the litigation, and what to make of the use of the word 'misconduct' in her reasons. She characterized Weatherford's conduct

as "misconduct in *the sense that* Weatherford, either erroneously or improperly, claimed privilege" (emphasis added). She specifically held that it "did not involve fraud, a breach of trust, an abuse of process, breached undertakings, ever-evolving claims, or the making of baseless allegations of dishonesty and misconduct" — the kind of intentional misconduct that warrants solicitor and client costs. Rather she concluded "there is an aspect of outrageousness, in that Weatherford commenced and continued a complex and expensive lawsuit against two parties when it was in possession of documents that should have alerted it to the fact that its time for doing so had expired" (Reasons at para 68).

16 While clearly commenting on the conduct of the litigation, the case management judge did not make a finding of intentional misconduct that would warrant solicitor client costs. Instead, she was doing what she was supposed to do under r 10.33(2)

> In deciding whether to impose, deny, or vary an amount in a costs award, the Court may consider all or any of the following:
>
> (a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;
>
> . . .
>
> (d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake
>
> . . .
>
> (g) whether a party has engaged in misconduct.

17 Consistent with the earlier finding in the summary dismissal application, the case management judge found that Weatherford commenced and continued a complex and expensive lawsuit against Artemis and Kaechele when it was in possession of documents (over which it had erroneously and improperly claimed privilege) that made it clear that the action was brought out of time (Reasons at para 68). The consequences of Weatherford's decisions are clearly relevant factors in the award of costs that the case management judge was entitled to consider. Those decisions unnecessarily lengthened the proceedings, were unnecessary, a mistake or improper. She held that

> While Weatherford's conduct warrants deterrence, I would not place it on the upper end of the scale of misconduct that justifies an indemnity of costs, but conclude that enhanced costs aimed at deterring such conduct are warranted.
>
> (Reasons at para 68)

18 This case demonstrates that misconduct is an imprecise term capable of a range of meanings. However when the full context of the reasons are considered, it is clear that the case management judge made no finding of intentional misconduct. Rather, she took account of Weatherford's conduct in the litigation and awarded enhanced costs for the time period that its conduct unnecessarily prolonged the litigation.

Disposition

19 There has been no error in principle, and no basis to interfere with the discretionary award of costs in this case. As such the appeal is dismissed. The cross-appeals are also dismissed for the same reasons.

Appeal and cross-appeal dismissed.

TAB – 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Blaze Energy Ltd. v. Imperial Oil Resources | 2014 ABQB 509, 2014 CarswellAlta 1498, 244 A.C.W.S. (3d) 32, [2014] A.W.L.D. 3990, [2014] A.W.L.D. 4065, [2014] A.W.L.D. 4066, [2014] A.W.L.D. 4073, [2014] A.W.L.D. 4077, [2014] A.W.L.D. 4079, [2014] A.W.L.D. 4080, [2014] A.J. No. 916 | (Alta. Q.B., Aug 15, 2014)

2001 ABQB 968
Alberta Court of Queen's Bench

LSI Logic Corp. of Canada Inc. v. Logani

2001 CarswellAlta 1733, 2001 ABQB 968, [2001] A.J. No. 1751, [2002] 4 W.W.R. 531, [2002] A.W.L.D. 140, 100 Alta. L.R. (3d) 49, 109 A.C.W.S. (3d) 866

In the Matter of Section 190 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of LSI Logic Corporation of Canada, Inc. and its shareholders

LSI Logic Corporation of Canada, Inc., Petitioner and Ramesh Logani and all other Dissenting Shareholders as Listed in Schedule A to the Petition, Respondents

The Canadian Pacific Limited Pension Trust Fund (Registered in the Name of Queen & Co.), The Canadian Pacific Express Transport Pension Trust Fund (Registered in the Name of Queen & Co.), The Canadian Pacific Hotels Master Trust "B" Pension Trust Fund (Registered in the Name of Queen & Co.), The Toronto Terminals Railway Company Pension Trust Fund (Registered in the Name of Queen & Co.), David W. Martin, Brian W.F. McLoughlin, Mary A. Sarah McLoughlin, Ivar Liepins, Luther Lee, Dean Temple, Wes Miller, Jyotsana Pachai, Gordon Waldmo, Lai-Fong Leung, Rebecca Wan, Azzedine Boubguira, Ramesh Logani, Gordon Sabiston, Joseph Szammer, Vally Szammer, Damir Andrei Susnjar, Neil Elliott, Donna Denison, Alex Ngi, James Soroka, Lawrence Pick, Peter Arabchuk, Beverly Cowan, Robert MacKechnie, Heather MacKechnie, Robert Ruddy, Timothy McCourt and Wilson Wong, Plaintiffs and LSI Logic Corporation of Canada, Inc., LSI Logic Corporation, 3096467 Canada Inc., LSI Logic Netherlands BV, David E. Sanders, Albert E. Pimentel, Horst Sandfort, Travis A. White, Thomas G. Smillie and Albrecht W.A. Bellstedt, Defendants

Fruman J.

Judgment: November 13, 2001
Docket: Calgary 9501-15628, 9901-04378

Proceedings: additional reasons to (2001), 204 D.L.R. (4th) 443, [2001] 11 W.W.R. 740, 19 B.L.R. (3d) 101, 96 Alta. L.R. (3d) 162 (Alta. Q.B.)

Counsel: *E. David D. Tavender, Q.C.*, *Gordon L. Tarnowsky*, *Lindsay A.M. Holukoff*, for LSI Logic Corporation of Canada Inc.
Leslie R. Duncan, Q.C., *Gordon J. McCue*, for Shareholders
Roderick A. McLennan, Q.C., *Donald W. Dear*, for Directors and Officers

Subject: Corporate and Commercial; Civil Practice and Procedure

ADDITIONAL REASONS to judgment reported at 2001 ABQB 710, 2001 CarswellAlta 1100, 204 D.L.R. (4th) 443, [2001] 11 W.W.R. 740, 19 B.L.R. (3d) 101, [2001] A.J. No. 1083, 96 Alta. L.R. (3d) 162 (Alta. Q.B.), respecting costs.

Fruman J.:

1 The plaintiffs are former shareholders of LSI Logic Corporation of Canada, Inc. They applied to strike fair value proceedings they had enthusiastically supported for more than three years. They also filed a new statement of claim, alleging oppression against LSI Canada and its directors and officers. LSI Canada stoutly defended its fair value proceedings, and moved to strike the oppression claim. The disagreement, which created a three-year diversion, culminated in five motions that I heard in a special chambers application in March, 2001.

2 LSI was successful in all five applications: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 710, [2001] A.J. No. 1083 (Alta. Q.B.). In the judgment I (i) dismissed the Shareholders' application to strike LSI Canada's fair value proceedings on the merits; (ii) decided that the Shareholders' application to strike was an abuse of process based on the doctrines of *res judicata* and election; (iii) determined that the Shareholders violated the implied undertaking in Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose and an express undertaking they had given not to use the information in any other litigation; (iv) decided they should not be relieved from the breach of their undertakings and granted an injunction restraining the Shareholders from making use of confidential information disclosed to them in the course of discovery; and (v) struck or stayed various portions of the Shareholders' statement of claim in the oppression action.

LSI Canada's Costs

3 The parties agree that LSI Canada is entitled to its costs. They disagree on quantum. The Shareholders contend that LSI Canada should receive party and party costs based on single column 5 of Schedule C to the *Alberta Rules of Court*, Alta. Reg. 390/68; LSI Canada submits that partial indemnity costs are appropriate. The parties are more than half a million dollars apart.

4 Costs are in the discretion of the court, and subject to the test of reasonableness, necessity or prudence: *Guarantee Co. of North America v. Beasse*, [1993] A.J. No. 1073 (Alta. Q.B.) at para. 13. There are three levels of costs: party and party costs; solicitor and client costs, which indemnify for costs that are essential to and arise within the four corners of the litigation; and solicitor and his own client costs, which may include services that are not strictly essential to the litigation: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1999), 251 A.R. 101 (Alta. Q.B.), at 106 citing *Sidorsky v. CFCN Communications Ltd.* (1995), 27 Alta. L.R. (3d) 296 (Alta. Q.B.) at 299.

5 Although a court has broad discretion in awarding costs, absent any misconduct on the part of the litigants, courts generally award costs on a party and party basis to balance two competing interests. On the one hand it is unfair to require a successful party whose conduct is not blameworthy to bear any costs incurred in prosecuting or defending the action; on the other hand, citizens will be hesitant to assert valid legal rights or even defend an action if an unsuccessful party is required to bear all the costs: *Trizec, supra*, at 106; *Reese v. Alberta* (1992), 133 A.R. 127 (Alta. Q.B.) at 130. See also: *Sidorsky v. CFCN Communications Ltd.* (1997), 206 A.R. 382 (Alta. C.A.) at 391.

6 In *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161 (Alta. Q.B.) at 172-73, the court characterized the award of complete indemnity costs as "rare and exceptional" and noted examples of conduct that would attract such an award. Although impropriety is an issue in this case, the tests for complete indemnity costs are not met.

7 Party and party costs are therefore appropriate. However, Schedule C is not to be applied mechanically in every case. It is "a very crude method by which to assess costs" and "cannot realistically achieve an appropriate level of costs in the context of complex [...] litigation": *Trizec, supra*, at 106 and 108. Schedule C is addressed to taxing officers: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1998), 216 A.R. 304 (Alta. C.A.) at 306. A judge has more flexibility. Courts may fix all or part of the costs with or without reference to Schedule C (R. 601.(2)(a)); award a gross lump sum instead of, or in addition to, any taxed costs (R. 601.(2)(e)); award all or part of costs as a multiple or proportion of Schedule C or as a proportion of solicitor and client costs (R. 601.(2)(d)); and award costs to different parties on different scales (R. 601.(2)(f)).

8 The Shareholders calculate LSI Canada's Schedule C costs at $36,800, and that is what they propose to pay. LSI Canada calculates the costs at $53,900. The discrepancy is primarily due to LSI Canada's inclusion of compensation for preparation and filing of written briefs, preparation for the hearing, and the attendance of a third counsel at the hearing. These items are properly included. However, both the Shareholders' and LSI Canada's calculated Schedule C costs are woefully inadequate given the

complexity of the five motions, the level of research and preparation required, and the outcome achieved. A costs award should aim at providing 40% to 50% indemnity in a typical case: Report of the Schedule C Committee at 3; *Trizec, supra*, at 106. The costs the Shareholders propose represent less than 5%.

9 Rule 601.(1)(e) permits a court, in setting costs, to consider conduct that tended to shorten the proceedings. It recognizes that slavish adherence to Schedule C may encourage inefficiency by precisely compensating for each day's work rather than providing incentives for streamlining the trial process. In this case counsel devoted considerable time and effort to reduce the hearing time. Six pretrial conferences and case management meetings were held to define time lines and handle problems. LSI Canada sifted through three years of fair value litigation to assemble an Agreed Record consisting of three bulky binders of documents with a table of contents 13 pages long. Counsel entered into a statement of agreed facts consisting of 79 items. And counsel submitted lengthy, detailed written argument, accompanied by a shelfful of case law. As a result of intense preparation, the hearing was compressed into two days. The time of the actual hearing is not a proper gauge of the complexity of the issues.

10 Costs based on a single column of Schedule C are not appropriate in this case. It is my preference to use Schedule C as a guide but also to consider the actual costs incurred, together with the factors identified in R. 601.(1) to arrive at a costs award that "reflect[s] the merits of the case, [...] the risks faced as a consequence of the litigation, the length and complexity of the [...] [submissions]" and the propriety of the proceedings: *Trizec, supra*, at 109.

11 Rule 601 permits a judge to consider, along with the result in the proceedings, the amounts claimed and recovered, (R. 601.(1)(a)), the importance of the issues (R. 601.(1)(b)) and the complexity of the proceedings (R. 601(1)(c)). In this case, the Shareholders courageously challenged LSI Canada's going private transaction and the court's authority to hear the fair value proceedings. Although their offensive manoeuvres were based on a shaky legal foundation, LSI Canada was nevertheless put to a defence on the merits, and mounted a collateral attack based on abuse of process. LSI Canada's challenges to the Shareholders' motion to strike and oppression claim were serious and well-founded and the Shareholders, understandably, mounted a vigorous defence. Many challenging legal and equitable principles were raised, requiring in-depth factual and legal analysis, and the subsequent reduction of that analysis into written briefs and oral argument.

12 The issues in these skirmishes - fair value, going private transactions, jurisdiction, abuse of process, election, *res judicata*, express and implied undertakings, waiver and injunction - were important, and although no money judgment was sought, the outcome was economically significant. Had the Shareholders succeeded, LSI Canada, having spent three years mired in chambers applications, case management meetings, document production, witness examinations and expert reports, would have had to begin again in a new proceeding that upped the financial stakes. The more than $4,000,000 LSI Canada paid to former shareholders for the fair value of their shares would be at risk. In turn, the Shareholders were faced with the possibility that their oppression action, in which they claimed damages exceeding $40,000,000, would be struck or stayed.

13 LSI Canada's preparation for the case was necessarily thorough; it included an extensive brief and reply brief, the Agreed Record, and a detailed chronology of events to dovetail with those documents. It participated in the preparation of the statement of agreed facts. LSI Canada also prepared the affidavits of Messrs. Beck and Bellstedt as well as a lengthy affidavit of Mr. Sanders detailing the history of the privatization transaction, the process that led to LSI Canada's fair value petition, and the history of the conduct of the proceedings over the past three years. Counsel prepared their witnesses for cross-examination, assisted in the preparation of answers to undertakings, and conducted a lengthy cross-examination of the Shareholders' representative, Mr. Martin.

14 The case for LSI Canada was led by Mr. Tavender, Q.C. With the complexity of the five applications it was entirely appropriate that he was assisted by Mr. Tarnowsky, who has participated in the fair value proceedings since their commencement, as well as Ms. Holukof and other associates, students and paralegals.

15 The Shareholders challenge the reasonableness of LSI Canada's actual costs, noting that they are more than double the Shareholders' costs. The comparison is unfair, for the burdens upon plaintiffs and defendants in lawsuits are not necessarily equal. I accept that defending the fair value proceedings, with their complicated legal history, would have involved more effort than launching the claims. Moreover, it is evident that LSI Canada's counsel did more work than the Shareholders' counsel

in terms of the number of witnesses they presented, the documents they reviewed and assembled, and the depth of their legal research. In any event, a party that is sued "is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice": *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. Gen. Div.) at 323. Concerns about the nature of the legal services can be addressed through taxation.

16 All of the factors I have considered to this point would support a costs award in the 40% to 50% indemnification range. However a court, in setting costs, is permitted to consider whether any step in the proceedings was improper, vexatious or unnecessary (R. 601.(1)(g)(i)). While courts should not discourage the assertion of valid legal rights by imposing heavy costs awards, the same is not true for vexatious proceedings. Regrettably, the Shareholders' litigation has a gloss of impropriety, which dictates a higher costs award.

17 The Shareholders might have thought they had a chance of challenging the validity of the fair value proceedings on the merits. But they could not have thought that their challenge was timely or appropriate. They were well aware that they had actively participated in, taken the benefit of, and invoked the court's jurisdiction and assistance in the fair value proceedings for more than three years. They had obtained, from the very court whose jurisdiction they later challenged, a court order paying them $3.00 per share on account of fair value, in respect of a transaction they later argued was *ultra vires* and unlawful. The Shareholders not only elected to follow the fair value proceedings instead of challenging them, they were also precluded from attacking the court's jurisdiction on the basis of *res judicata*. Their attempt to strike the fair value proceedings was an abuse of process.

18 Equally serious, in launching the oppression claim the Shareholders breached the implied undertaking under Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose, as well as their express contractual undertaking not to use information disclosed in the fair value proceedings in any other litigation. The Shareholders' counsel concedes that the violation of both the express and implied undertaking "may seem to be misconduct". He contends, however, that "there is no element of willful misconduct or lack of good faith" (Shareholders' costs brief at 8). This bare assertion is not supported by evidence that permits me to examine the Shareholders' motives in order to reach that conclusion.

19 The implied undertaking applies as a matter of law to the Shareholders, as it applies to every other Alberta litigant. Its violation is an abuse of the court's process: *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355 (Ont. Gen. Div.), at 369. Because the implied undertaking applies equally to parties and to their legal counsel, it cannot be assumed, in the absence of compelling reasons, that the undertaking was breached "in good faith".

20 The express undertaking in this case was created by contract. It was agreed by counsel that the documents disclosed through the course of the proceedings were "not to be used except for the purposes of this litigation" (Agreed Record, Tab VIII hh). The parties agreed that the documents would not be disclosed to all dissenting shareholders, but only to members of the Dissenting Shareholders Committee who would agree to accept the non-disclosure conditions in writing before reviewing the documents (Agreed Record, Tab VIII ii). These express provisions leave little room for excuses.

21 These breaches were serious; I refused to waive them and I granted an injunction against the Shareholders. LSI Canada was forced to prove these breaches in order to strike out portions of the oppression claim. It had no choice but to defend its fair value proceedings from a challenge that was an abuse of process. Whatever the Shareholders' motives might have been, LSI Canada should not be compelled to bear the costs of improper and unnecessary proceedings.

22 Finally, I note that in February of 1998 the parties put in place an elaborate protocol for the management of information requests, expert reports, evidence at trial, judicial dispute resolution and case management, the intent of which was to "facilitate a summary and efficient resolution" of the fair value dispute in the Court of Queen's Bench (Agreed Record, Tab VIII rr). That protocol, negotiated by the parties, was the subject of a consent order, which has not been appealed. It invited the court to impose costs and other sanctions, including solicitor and client costs, "if at any time in the opinion of the Court either of the parties has not, without reasonable excuse, met the intent of the protocol." I do not rely on the protocol in imposing costs in this case. However, I do note that the Shareholders' three year diversion has resulted in anything but a summary and efficient resolution.

23 I award LSI Canada $^2/_3$ of its solicitor and client costs. I also award disbursements and GST as applicable.

The Directors' Costs

24 The oppression claim launched by the Shareholders also named six former directors and officers of LSI Canada as defendants. They have been represented by Mr. McLennan, Q.C., and Mr. Dear throughout the proceedings. The Shareholders contend that the directors and officers should receive only their single column Schedule C costs, which they calculate at $19,300. The directors and officers calculate the Schedule C costs at approximately $30,000. However, the directors and officers claim full indemnity costs, and "repeat, rely upon and concur with positions taken" by LSI Canada in its brief (directors' and officers costs brief at 6).

25 The Shareholders' oppression statement of claim contained relatively few allegations against the directors and officers. They filed a notice of motion to strike the claim against them on the basis that it disclosed no cause of action. A few weeks before the hearing, the Shareholders applied to amend the statement of claim to strengthen the allegations against the directors and officers. The possibility of an amendment application was not mentioned at the six case managements held to organize the hearing and, accordingly, it was not accounted for in the limited time booked for the special application. A strict timetable had been set months earlier for the filing of briefs. Had the Shareholders' untimely amendment application proceeded, briefs would have been delayed, jeopardizing the entire special chambers hearing. As a result, I adjourned *sine die* the Shareholders' motion to amend and the directors' and officers' application to strike, without prejudice to the directors' and officers' ability to apply for costs in relation to the adjournment. At the special chambers hearing I learned that the Shareholders' had filed but not served a new oppression statement of claim against the directors and officers.

26 Prior to the adjournment, the directors and officers prepared a notice of motion and a detailed brief. No doubt they participated in the preparation of the agreed statement of facts and Agreed Record. Given the long history of this litigation and the number of documents, it would have taken considerable time for them to acquaint themselves with the file.

27 Because of their common interest in the outcome of the litigation, the directors and officers participated in the special chambers application despite the adjournment. However, their oral argument was minimal, as they spoke only on the issue of striking the oppression claim, and substantially supported LSI Canada's more comprehensive arguments.

28 In view of the circumstances of the adjournment of their motion to strike, and the nature and extent of their participation, I award the directors and officers $^1/_3$ of their solicitor and client costs. I also award disbursements and GST as applicable.

29 I am uncertain whether all issues between the Shareholders and the directors and officers are now at an end. In the event the directors' and officers' motion to strike, the Shareholders' motion to amend or the Shareholders' new oppression claim resurface in the future, the preparation and briefing done by the directors and officers for the adjourned applications may prove to be of considerable value. As the level of costs recovery is quite low, should that occur, the directors and officers have leave to reopen the issue of these costs at that time.

Joint and Several Liability for Costs

30 In considering whether to award costs on a joint and several basis against all the Shareholders, "the first point to consider is whether the plaintiffs in bringing this action acted jointly [...]": *King v. On-Stream Natural Gas Management Inc.* (1993), 21 C.P.C. (3d) 16 (B.C. S.C.) at 21. It is clear that they did. The Shareholders' statement of claim alleges that they have "a common interest in the [...] proceedings [...] having suffered the same wrong and having undifferentiated claims" (Agreed Record, Tab I, para. 2). The Shareholders pursued like remedies arising from the same alleged cause of action and in doing so have acted in concert and presented a united front: *Filipovic v. Upshall*, [1998] O.J. No. 4498 (Ont. Gen. Div.). They appointed a Dissenting Shareholders' Committee to guide the litigation. They have always been represented by common counsel.

31 The Shareholders submit that costs should be imposed on a several, not joint and several, basis. They argue that the imposition of joint and several costs will erode the dissent and fair value provisions of the *Canada Business Corporations Act*,

R.S.C. 1985, c. C-44, and will deter shareholders with significant means from exercising dissent rights, presumably because they will be made to pay the freight for the entire lawsuit (Shareholders' costs brief at 10).

32 But this litigation is not about shareholders exercising dissent rights under the *CBCA* to have a court determine the fair value of shares. It is an attempt by shareholders to walk away from fair value proceedings they have followed and benefited from for three years. Unlike fair value proceedings, the Shareholders in this litigation did not come together spontaneously because of common statutory rights. The litigation was devised by a small group of significant stakeholders who recruited other shareholders to join them. I do not suggest that they acted improperly in doing so. But they were free to make contractual arrangements, including fee and costs sharing arrangements, with shareholders who joined the litigation "to address the risk of what lay ahead and to provide for the contingency of losing": *King*, *supra* at 23. LSI Canada was not in that position. There is no reason that it should it be faced with the effort and risk of collecting separate costs judgments from 79 plaintiffs.

Summary

33 I award LSI Canada $^{2}/_{3}$ and the directors and officers $^{1}/_{3}$ of their respective solicitor and client costs, in each case together with all disbursements and GST as applicable. In the event of a disagreement whether legal fees were incurred to address issues "within the four corners of the litigation", costs and disbursements may be taxed by a Queen's Bench taxing officer. Costs are awarded against all Shareholders on a joint and several basis. They are payable forthwith, and in any event of the cause.

Order accordingly.

TAB – 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Blaze Energy Ltd. v. Imperial Oil Resources | 2014 ABQB 509, 2014 CarswellAlta 1498, 244 A.C.W.S. (3d) 32, [2014] A.W.L.D. 3990, [2014] A.W.L.D. 4065, [2014] A.W.L.D. 4066, [2014] A.W.L.D. 4073, [2014] A.W.L.D. 4077, [2014] A.W.L.D. 4079, [2014] A.W.L.D. 4080, [2014] A.J. No. 916 | (Alta. Q.B., Aug 15, 2014)

1999 ABQB 801
Alberta Court of Queen's Bench

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.

1999 CarswellAlta 1469, 1999 ABQB 801, [1999] A.J. No. 1252, 251 A.R. 101

Trizec Equities Limited, Plaintiff and Ellis-Don Management Services Ltd., et al, Defendants and The Cohos Evamy Partnership et al, Third Parties and Trizec Equities Limited et al, Fourth Parties

Western Caissons Limited, Plaintiff by Counterclaim and
Trizec Equities Limited et al, Defendants by Counterclaim

Hardy BBT Limited, Plaintiff by Counterclaim and Trizec Equities Limited et al, Defendants by Counterclaim

Mason J.

Judgment: October 27, 1999
Docket: 8901-05540

Proceedings: additional reasons to (1998), 1998 CarswellAlta 143, 42 C.L.R. (2d) 1, 227 A.R. 1, 66 Alta. L.R. (3d) 1, [1998] A.J. No. 179, [1999] 5 W.W.R. 1 (Alta. Q.B.); affirmed (1999), 1999 CarswellAlta 994 (Alta. C.A.)

Counsel: *B.G. Nemetz*, *E.B. Mellett*, for Trizec Equities Ltd.
T.C. Ferguson, Q.C., for Hardy BBT Ltd.
A.J. McConnell, for Western Caissons Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts; Insurance; Contracts

ADDITIONAL REASONS to judgment reported at 1998 CarswellAlta 1469 (Alta. Q.B.) with respect to costs.

***Honourable Mr. Justice D.B. Mason*:**

Introduction

1 This is an application for costs by the Defendants Hardy BBT Limited (hereinafter "Hardy"), now known as AGRA Earth & Environmental Limited, and Western Caissons Limited ("Western Caissons"), now known as AGRA Foundations Limited, for the costs of the trial of this action, as successful Defendants against the claims advanced by the Plaintiff, Trizec Equities Limited ("Trizec"). In its application, Hardy seeks directions respecting its Bill of Costs on the following issues:

(a) What is the appropriate scale of party-party costs to be applied under Schedule "C" of the Tariff of Costs of the Court of Queen's Bench of Alberta?

(b) Should the inflation multiplier be applied to the fee portion of the Bill of Costs?

(c) Is the Defendant Hardy entitled to tax costs for second counsel at trial?

(d) Does Item 21 on Schedule C apply to the first day of each witness examined for discovery?

(e) Should there be a special allowance for written submissions?

(f) Is the Defendant Hardy entitled to tax the reasonable accounts of the experts retained by it?

(g) Is the Defendant Hardy entitled to an allowance for daily transcripts at trial?

(h) Is the Defendant Hardy entitled to an enhanced fee for preparation of the Bill of Costs and taxation?

2 The Defendant, Western Caissons, applies for direction with respect to its taxable costs, and specifically raises the following issues:

(a) Is this Defendant entitled to tax costs for second counsel?

(b) Is this Defendant entitled to recovery of its reasonable costs paid to Marc Sabourin, Dr. N.R. Morgenstern, Ronald Hendy and Sandy Navrady with respect to their presentation of expert evidence at the Trial of the within action?

(c) Is this Defendant entitled to recovery of its reasonable costs paid to Marc Sabourin as proper officer in this Action?

(d) Is this Defendant entitled to an enhanced fee for the submission of written argument after the conclusion of Trial?

(e) Is this Defendant entitled to an enhanced fee for the costs associated with the preparation of the Bill of Costs?

(f) Is this Defendant entitled to an enhanced fee for all correspondence necessarily relating to the within proceedings?

(g) Is this Defendant entitled to costs based upon a multiple of Column 6 of Schedule "C" to the Rules of this Honourable Court? If so, what multiple should apply?

(h) Should any costs awarded to this Defendant be grossed up to take into account the effects of inflation since Schedule "C" to the Rules of this Honourable Court were implemented [in 1984]?

3 The Plaintiff, Trizec, does not take issue with the following matters raised by these applications for costs:

(1) Entitlement to second counsel fee where in attendance at trial;

(2) Entitlement to a reasonable special allowance for written submissions;

(3) The general principle of entitlement to tax reasonable accounts of most experts; and

(4) An allowance for daily trial transcripts.

4 Trizec disputes the Defendants' claims for a multiple of four times Column 6 of the old Schedule"C" of the *Alberta Rules of Court*, and any allowance for an inflationary multiple. Trizec also takes issue with the charges sought for the expert witnesses Ronald Hendy and Marc Sabourin. Finally, Trizec disagrees with the Defendants' interpretation of Item 21 of old Schedule "C", concerning examination for discovery.

Summary of the Action

5 On April 14, 1989, Trizec issued its Statement of Claim in these proceedings against a number of defendants, including Hardy and Western Caissons (collectively referred to as "the Defendants"). Third and fourth party proceedings were initiated as well as counterclaims by both of these Defendants.

6 The Plaintiff's action against Hardy was for breach of contract and professional negligence in the delivery and performance of geotechnical services on the Plaintiff's Bankers Hall project. It was alleged that, as a result of Hardy's alleged professional

negligence, the shoring wall on 9th Avenue S.W. moved, causing the Plaintiff to suffer damages in excess of $20 Million, inclusive of interest, as a consequence of delay, redesign, loss of parking revenue, the BP renegotiation and other claims for damages.

7 As against Western Caissons, Trizec claimed breach of contract, professional negligence in the design and installation of the shoring wall, the design and installation of the site dewatering system and claimed damages on the same basis as against Hardy.

8 The trial of the action commenced September 11, 1995 and testimony concluded on July 12, 1996, following 145 days of court sittings.

9 Judgment was rendered on February 13, 1998, finding that neither Hardy nor Western Caissons were legally responsible for the construction problems experienced at Bankers Hall. Trizec's action, as framed at the commencement of trial, was dismissed with costs to be spoken to on proper application. The judgment roll was filed on March 27, 1998.

10 No oral submissions were made by counsel in open court following the trial. Counsel submitted, and I accepted, their submissions that the parties file written argument. In hindsight my decision was unwise. Written arguments were filed in September and October of 1996. The parties were asked to address certain, specific issues in December of 1996 and to provide short summaries of their arguments with respect to geotechnical issues in January of 1997. At that time, the parties were also asked to provide a time line for the shoring wall on 9th Avenue, S.W.

11 Further submissions were sought from counsel respecting certain insurance issues, which were filed in October of 1997. Finally, counsel were requested to provide further submissions respecting Trizec's claim for loss of revenue related to the loss of the fifth level of parking at Bankers Hall, the acquisition of Gagliardi Parkade and issues of mitigation.

12 Trizec claimed damages in excess of $20 Million as a consequence of the delay, re-design, loss of parking revenue, re-negotiations with the lead tenant as well as other related heads of damage.

13 The major portion of the trial involved issues of geotechnical assessment, design and construction of the shoring wall for the installation of the foundation for Bankers Hall.

14 The trial was lengthy and complex. Geotechnical issues and certain issues of damages were novel. Experts were called, not only with respect to issues respecting breach of contract and professional negligence, but also in the area of damages and insurance. The case proceeded following a number of 'late in the day' pre-trial agreements that reduced the number of defendants and focussed the issues of liability on these two defendants. According to counsel, the trial proceeded at a "gruelling" pace which was demonstrated by the transcripts which were slightly less than 20,000 pages, exclusive of exhibits.

15 The focus of the case on these two defendants, the nature of the allegations and the amount of damages claimed made the matter of extreme and vital importance to both defendants.

16 Efforts to resolve the taxable costs between the parties were unsuccessful, resulting in this application.

Issues

(1) What is the appropriate disposition as to the issue of costs in this particular case?

(a) Position of the Parties

17 Hardy and Western Caissons are requesting costs on the basis of a multiple of 4 times column 6 of the old Schedule C, together with an inflation factor of 1.45. They submit that an award of costs should reflect a reasonable apportionment of the successful party's litigation expenses. The Defendants suggest that, in this case, the relevant factors which ought to be considered in determining the appropriate apportioning of costs are: the amount of Judgment sought; the time required by counsel; the relationship of the parties and their conduct prior to and during trial; the importance of the case between the parties; the difficulty and the complexity of the issues; and the length of the trial.

18 Trizec submits that, in awarding costs, the Court should be guided by the percentage level of the indemnity that results from the award. Trizec suggests that an appropriate level of indemnity in this case would be between 33%and 48%. It concedes that some increase of the amount prescribed by column 6 of Schedule C is warranted, but submits that the level of costs sought by the Defendants approaches, and in some instances exceeds, full indemnity. Trizec argues that indemnity costs are only warranted where there has been misconduct on the part of the unsuccessful or payor litigant. As that has not been the case here, they submit that such costs would be inappropriate. They suggest that three times the amount of column 6 would achieve approximately 33% of the Defendants costs, which, in their submission, would be an appropriate level of recovery.

(b) Analysis

19 Section 19 of the *Court of Queen's Bench Act*, R.S.A. 1980, c.C-29, together with Rules 601 to 612 of the *Alberta Rules of Court*, give the Court full discretion over costs. That discretion must, however, be exercised judicially. Generally costs follow the event and will be awarded on one of three levels:

1. Party and party costs: calculated on the basis of Sched. C of the *Alberta Rules of Court* or some multiple thereof, plus reasonable disbursements.

2. Solicitor and client costs: which provide indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.

3. Solicitor and his own client costs: sometimes referred to as a complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the litigation. (See: *Sidorsky v. CFCN Communications Ltd.* (1995), 27 Alta. L.R. (3d) 296 (Alta. Q.B.) at p.299)

20 The general rule, absent any misconduct on the part of the litigants, is to award costs on a party and party basis. This practice reflects the Canadian and, indeed, the Alberta philosophy regarding costs which was succinctly set out in *Reese v. Alberta* (1992), 133 A.R. 127 (Alta. Q.B.) at page 130, and adopted by our Court of Appeal in *Sidorsky v. CFCN Communications Ltd.* (1997), 53 Alta. L.R. (3d) 255 (Alta. C.A.) at p. 265:

> The Canadian practice reflects an attempt to balance two conflicting interests. On the one hand, it is argued that if a party is successful and there are no circumstances constituting blameworthiness in the conduct of the litigation by that party, it is unfair to require the successful party to bear any costs incurred by his counsel in prosecuting or defending the action. On the other hand, it is argued that if the unsuccessful party is required to bear all the costs of the successful party, citizens will be unduly hesitant to sue to assert their rights (even valid ones) or to defend their rights when sued. The partial indemnity practice as it exists in Canada is a compromise intended to give some scope in practice for each of the conflicting policy considerations.

21 In Alberta, the application of this philosophy has, in the usual course, lead to an attempt by the Courts to award costs which achieve indemnity in the range of 40% to 50%. This practice is reflected in the discussions of the Schedule C Committee, which was struck in order to develop the amendments to Schedule C which were adopted in 1998. At page 5 of its Interim Report the Committee stated that:

> The hard issue is what share of the actual costs should be borne by the unsuccessful litigant. Should it be 80% as perhaps in England or 15% as in Alberta. The Committee considers that it should approach 40-50% in a typical case. Any number is, of course, arbitrary. We must also remember that costs are in the Court's discretion and can be increased or reduced as the case warrants. In fact, however, that discretion is often not exercised.

22 In instances where the Court determines that it is necessary to depart from Schedule C and exercise its discretion to increase costs beyond those set out in the tariff, it has been the practice in Alberta to order costs based on a multiple of fees set by Schedule C. In its report dated September 2, 1997, the Schedule C Committee reiterated its views concerning the aim of a

40 to 50% recovery rate and discussed a more appropriate way in which to deal with costs where the application of Schedule C rendered an inadequate level of recovery. At p. 3, the Committee wrote:

> In formulating the revised schedule, the Committee aimed at providing 40% to 50% indemnity in a typical case. In circumstances where the revised schedule meets that target there will generally be no need for the Court to exercise its discretion. When the Court does exercise its discretion, reference to a proportion of solicitor and client costs can provide valuable guidance for the Court and other litigants.
>
> By way of example, a case where the amount at stake is small but important legal issues are involved the costs under the appropriate column of Schedule C might provide only10% of the actual solicitor and client costs for the successful litigant. Assuming that the litigation was conducted fairly and efficiently, the successful litigant could ask the Court to exercise it's discretion to increase the award beyond the appropriate column. If the Court considers that 50% indemnity is appropriate in the circumstances but merely awards costs on a higher column or on a multiple of a column, it provides little or no guidance to other litigants about the appropriate level of costs. However, if the Court awards 50% of actual solicitor and client costs in those terms, then that provides a clear reference point for other cases. Similarly, an unsuccessful litigant may, in the right circumstances, ask for a similar costs order on the basis that the tariff would produce more than 50% indemnity.
>
> ... It is the Committee view that the Court should make the ultimate determination of the appropriate level of costs on an ongoing basis and that this is a healthy process provided that decisions on costs are transparent enough to provide meaningful guidance.

23 Schedule C, like all fixed tariffs, is a very crude method by which to assess costs and the application of a multiplier only exacerbates those inadequacies. Eric T. Spink, formerly of the Alberta Law Reform Institute, prepared a background paper for the Schedule C Committee entitled *Party and Party Costs* (October, 1995) [unpublished]. At page 65 he observed:

> In [the context of cost shifting], schedule C appears to be an obviously dated and crude instrument for addressing the difficult issues surrounding party and party costs. Changing the numbers would be an easy enough task if there was any indication just what the numbers were supposed to accomplish. It seems impossible to relate the existing schedule C to any targeted proportion of actual fees, and an adjustment for inflation without a sound base figure is really a shot in the dark. The fixed tariff approach is so inherently problematic that the committee can't go far wrong by adjusting the numbers, assuming the mandate of the committee is so restricted. There are no successful fixed tariffs upon which to model Schedule C.

24 The British Columbia *Supreme Court Rules* explicitly acknowledge that, in some circumstances, an award of costs based on the tariff of fees will be inadequate. Accordingly, those *Rules* provide for an order of "increased costs" where the Court determines that ordinary costs (similar to our party and party costs) would lead to an unjust result. (See: Appendix B, section 7 of the British Columbia *Supreme Court Rules*). Increased costs are calculated as 50% of special costs (essentially solicitor client costs), or such other proportion as the Court may order. In awarding increased costs the British Columbia Courts have routinely employed the percentage concept.

25 The percentage approach to determining costs is not new to Alberta, and has been employed in a number of cases. For example, in *Lawler v. Ron's Coach & Bus Repairs Inc.*, [1998] A.J. No. 660 (Alta. Q.B.), Burrows, J., although he ultimately ordered costs on a lump sum basis, adopted the percentage approach in determining the appropriate level of recovery. In that case, an award based on Schedule C would have allowed recovery of approximately 25%, however, the Court felt that an award of 33% would be more appropriate and, accordingly, made a lump sum award based on that rate. In doing so, his Lordship commented, at page 3, that, in the context of adjusting cost awards for inflation, "the ultimate goal in each situation is that the final total of costs awarded be reasonable given the nature of the case."

26 As the Court of Appeal stated in *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, [1998] A.J. No. 404 (Alta. C.A.) "Canadian taxable court costs are traditionally designed to be a fraction of solicitor client costs." Thus, in my view, where the application of Schedule C does not result in an appropriate level of costs it makes infinitely more sense to simply determine what percentage of indemnity is appropriate and make the award on a percentage basis, than it does to determine the appropriate

level of costs and then invent a formula, using a multiplier, to arrive at that level of recovery. Put another way, determining a level of recovery and then working backwards to find an equation which supports it is an exercise in fiction which, as the Schedule C Committee pointed out, is of little precedential value to either the Courts or future litigants.

27 It is my opinion that, in the majority cases, Schedule C, in either its present or previous form, cannot realistically achieve an appropriate level of costs in the context of complex and protracted litigation. Schedule C was instituted for the purpose of dealing with the common stream of litigation. Long trials do not fit the mould for a number of reasons which include: the time for preparing and organizing documents for the purposes of production; the preparation time required in relation to examinations for discovery; the utilization of technology and computers to prepare immediate court records; the inordinate efforts involved in collating testimony and thousands of pages of exhibit documents in order to prepare written submissions following trial; and the fact that these trials consume counsels' time for many months to the exclusion of any other work. The deficiencies created by the application of Schedule C in the context of unusually long trials was also recognized by the Court of Appeal in *Ed Miller Sales & Rentals Ltd.* , *supra*.

28 The application of a multiplier is particularly ill-suited to long trials. As Trizec points out, where a long trial is concerned, the application of a multiplier may overcompensate the successful party in relation to those items included in the tariff which operate on a per diem basis. Thus, they argue, the longer the trial runs the more likely it is that a multiplier will produce a costs award which approaches indemnity. Conversely, Western Caissons submits that even with the application of a multiplier, the award would be insufficient in relation to some items included within the tariff. As a result they have asked for enhanced awards in relation to the written arguments prepared and submitted at the request of the Court, the preparation of the Bill of Costs and the correspondence necessarily relating to the proceedings. It takes the position that an enhanced order for costs in relation to those items is necessary in order to appropriately compensate for the costs attendant on those items which, in this case, are much greater than the amounts recoverable under Schedule C, even with the application of the suggested multiplier.

29 While the Schedule C Committee considered and rejected adopting, whole scale, a more principled approach to awarding costs in the context of the ordinary stream of litigation, in my view utilizing a percentage approach to costs, at least in the situation of long and complex trials, avoids the fiction of applying multipliers to set fees.

30 I agree with the Schedule C Committee that an award for costs should, generally speaking, approach the 50% mark. However, as the Committee recognized the level of indemnity will vary in some cases, in my view the percentage of recovery should reflect the merits of the case, the respective relationship between the parties, the risks faced as a consequence of the litigation, the length and complexity of the trial and the preparation, presentation and submissions made to assist the Court in its deliberations. This is not intended to be an exhaustive list, and in other circumstances the criteria may vary.

31 In the present case, Trizec approached the task of prosecuting its claim by putting at issue the whole of the Defendants' Calgary operations over the last 15 to 20 years. To assist in proving its case, Trizec called experts in a number of disciplines including: the field of geotechnical analysis, from glaciologists to geotechnical engineers; soil analysis and dewatering of major downtown excavation sites; global stability analysis and developing computer technology; real estate evaluation; commercial and retail leasing; and insurance and owner-controlled insurance programmes designed for major construction sites. Given the scope of the case put forward by Trizec, the Defendants were obliged to present an equally thorough and broad defence. Additionally, although the action was brought against a variety of building professionals, including architects, structural engineers, the general contractor and the building sub-contractors, Trizec took strategic aim and sought recovery from these two Defendants in particular. One of those Defendants, Hardy, was without professional negligence insurance which was known to Trizec as it was an issue at the trial. Western Caissons was insured under the owner controlled insurance which was put in place at Trizec's behest and was clearly inadequate to meet the scope of the claims and the heads of damages advanced by Trizec. Given the magnitude of the damages sought, Hardy and Western Caissons, without the benefit of adequate insurance coverage, had little choice but to defend against the claims advanced by Trizec, a task which, by itself, had the potential to bankrupt both parties.

32 In light of those circumstances, I find that a costs award based on a 50% recovery level would be inadequate in this type of case. Accordingly, I award costs in favour of the Defendants, in an amount equal to 60% of what will be assessed as

appropriate solicitor client costs. This approach to the assessment of costs will change a number of the issues raised before me on the application for costs in the first instance.

33 I am hopeful that with this ruling, the parties may be able to finalize all cost issues between them. However, I am prepared to revisit any of the cost issues raised before me on the initial applications, on proper notice.

Order accordingly.

TAB – 7

2008 ABQB 537
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2008 CarswellAlta 1163, 2008 ABQB 537, [2008] A.W.L.D. 3911, [2008] A.W.L.D. 3915, [2008] A.J. No. 965, 172 A.C.W.S. (3d) 589, 46 C.B.R. (5th) 243

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Judgment: August 28, 2008
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean F. Collins, Fred Myers, Jay A. Carfagnini, Brian F. Empey for Applicants, CCAA
Patrick McCarthy, Q.C., Josef A. Kruger for Monitor
A. Robert Anderson, Q.C., Michael O'Brien for Independent Trustees of Calpine Commercial Trust, Directors of Calpine Power LP Ltd.
Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.
Brian P. O'Leary, Q.C., Patricia Quinton-Campbell for Khanjee Holdings (U.S.) Inc., Khanjee Power Generations LLC, WASP ENERGY LLC. et al
Anthony L. Friend, Q.C., Scott D. Bower for Catalyst Capital Group Inc.

Subject: Civil Practice and Procedure; Insolvency

ADDITIONAL REASONS regarding costs of unsuccessful applications to set aside order in *Companies' Creditors Arrangement Act* proceedings.

***B.E. Romaine J.*:**

1 Often in proceedings under the *Companies' Creditors Arrangement Act*, costs are not awarded against unsuccessful parties. There are policy reasons for this convention: generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief. The applications brought by Khanjee Holdings (U.S.) Inc. and the Catalyst Capital Group Inc. that are the subject of this decision on costs are different from the usual type of CCAA application in that they were disappointed bidders or potential bidders on the purchase and sale of an asset of one of the Calpine applicants. Catalyst sought re-consideration of an existing order and Khanjee sought an amendment to an existing order that would allow it to bid on the asset despite its contractual obligation not to do so. The parties are sophisticated commercial entities that entered the fray voluntarily in an attempt to better their positions, with respect both to their ability to acquire the Class B Units and the Fund-related contracts of CLP and the take-over bid for the publicly-traded trust units of the Fund. The policy reasons that underlie the no-costs convention are thus not operative in this case, and there is no reason to depart from the general rule awarding costs to the successful parties, not as a punishment but as a recognition of the usual risks of litigation. Thus, there will be costs awarded, and the remaining issue is to whom and in what amount.

2 The successful parties submit that since the Court was able to dismiss the applications without calling on submissions from parties other than the applicants, and for reasons that made it clear that I found the applications lacking substantial merit, there should be a costs award compelling the applicants jointly or separately to pay costs on a full indemnity basis. Although the applications had little chance of success for the reasons I expressed in my decisions, given the context in which they were brought, I cannot find that they were so improper or vexatious as to warrant an exceptional award of complete indemnity costs. While there was an allegation at least in the case of Khanjee of impropriety in the mere fact that the application was brought in the face of the confidentiality agreement to which it had bound itself, that issue will be addressed more fully in terms of party and party costs.

3 As I noted in my reasons dated February 8, 2007, the process of marketing the Class B Units and Fund-related contracts of CLP was abbreviated and rapidly evolving, largely due to the complication and timing of the take-over bid proceedings for the Fund's A Units. Given the objective of obtaining the best price for the Fund-related assets for the benefit of stakeholders in the CCAA process, I could not afford interested parties the luxury of a lengthy auction process. The situation was further complicated by the Settlement Agreement application and the holiday season, which made it difficult for interested parties to respond to unfolding events. Despite the best efforts of interested parties and the extremely rapid response of the Monitor to competing offers, stakeholders were often put in a difficult position with respect to evaluating information. As I said previously, the process was not pretty, the financial stakes were very high and conduct that in other circumstances may have given rise to penal costs must be viewed with greater tolerance.

4 Khanjee applied to set aside the January 30, 2007 approval of the bid by HCP Acquisition Inc. with a direction that the party that successfully acquired the Fund's Class A Units be required to purchase the B Units at the price fixed by the Court on January 30, 2007. Alternatively, Khanjee submittted that there should be a new auction process, and that it be permitted in that process to submit an offer to purchase the Fund-related assets. I held that Khanjee's application was essentially a request that I allow it to circumvent a confidentiality and standstill agreement into which it had freely entered, that I did not have jurisdiction over an unknown purchaser of the Fund's A Units so as to compel it to purchase the Fund-related assets, and that Khanjee had failed to raise any new material evidence that would justify a reconsideration of my previous decision.

5 Khanjee was a participant in the Fund's search for a white-knight in response to Harbinger's take-over bid for the A Units. As a condition to being allowed access to confidential information in connection with the potential acquisition of the Fund, Khanjee executed a confidentiality agreement that restricted it from being able to submit an offer for the Fund-Related Assets. Khanjee submits that its participation in the take-over bid process was predicated on the understanding that the Fund was able to control the sale of both the Class A Units and the Fund-Related Assets and it is critical about the information made available to the Monitor and the Court relating to the marketing process and the disclosure made available by the Fund. Khanjee suggests that the combination of the take-over bid process and the CCAA process had become a "quagmire for any interested, serious" bidders, and that this justified its last minute application.

6 While the details of the confidentiality and standstill agreements may not have been fully-disclosed in the information before the Court on January 30, 2007, the gist of the contractual limitations and the negative effect they would have on the auction process was adequately described in the Monitor's reports. Khanjee's application added little by way of relevant information to the process. Participation in a public take-over bid for securities is indeed rife with strategic risk for an interested bidder, but that cannot justify the type of interference with contractual obligations unrelated to the Calpine applicants envisioned by the Khanjee application. These submissions do not justify relief from a costs award against Khanjee.

7 Catalyst's application requested that the January 30, 2007 approval of the bid by HCP Acquisition Inc. be set aside and that Catalyst be permitted to submit a written proposal for the acquisition of the Fund-Related Assets in a form that had been provided to the Monitor dated February 8, 2007. I held that the new proposal was not substantially different from that presented by counsel in oral submissions on January 30, 2007 and that it still suffered from serious contract termination risks. I also held that the application was an attempt to re-argue Catalyst's case. Catalyst submits in this costs application that it had not been able to make adequate representations in the first application about its operational expertise, which, it says, relates to whether it would have been unreasonable for the Fund to refuse its consent to the transfer of the Fund-related contracts. This was always

a minor factor, as it was not the Fund's ability to withhold consent but the time it may have taken to resolve the issue through litigation that was of greater relevance to consideration of the competing offers.

8 Catalyst also complains that my reasons of February 8, 2007 were "for some reason" not provided to Catalyst or its counsel. Counsel of record for Catalyst at the time of the January 30, 2007 hearing was advised of the availability of these reasons at the same time as all other counsel. It is unfortunate that Catalyst's change of counsel may have led to a delay in new counsel receiving a copy of the decision.

9 Catalyst also suggests that it brought its application only upon becoming aware that Khanjee was bringing an application in any event. That, unfortunately, did not relieve opposing parties from having to address Catalyst's application separately.

10 Catalyst also suggests that its February 8, 2007 offer was different from what had been presented on January 30, 2007. While there were some differences, I found the new offer not be substantially different, particularly in the key area of contract transfer and termination risks. In short, these submissions do not justify relief from a costs award against Catalyst.

11 Three parties seek costs from Khanjee and Catalyst. There are the Calpine parties (which seek costs, including the full-indemnity costs of any person entitled to indemnity from them with respect to the reconsideration applications), the Independent Trustees of Calpine Commercial Trust and the Directors of Calpine Power L.P. Ltd. (the general partner of Calpine Power L.P.) and HCP Acquisition Inc.

12 With respect to the party and party costs of each of these claimants, I am satisfied that, given the accelerated and intense process necessitated by the reconsideration motions and the nature of the litigation, Schedule C of the Rules of Court is inappropriate as a guide.

13 I also note that Khanjee and Catalyst did not act jointly, and that therefore joint and several cost awards are not appropriate in this case.

14 I have considered the estimated solicitor and client costs of each of the claimants, and have concluded that HCP Acquisition Inc. and the Trustees and Directors of the Fund and its general partner should receive the same level of reimbursement of costs, roughly commensurate with the principle that a costs award should aim at providing 40% to 50% indemnity: *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para. 8. I therefore award each of these claimants costs in the amount of $6,300 against each of Khanjee and Catalyst, plus one half of their reasonable disbursements.

15 The indemnity costs claimed by the Calpine applicants are considerably higher than those claimed by the other two successful parties, and I note that they impliedly include the costs of other parties who have a right to seek indemnification from the Calpine applicants for the costs of appearing on this application. As pointed out by Catalyst, security instruments that may contain such types of indemnity provisions were not in evidence, but I take note that the costs of the Monitor and the Monitor's counsel are costs that must be borne by the creditors of the estates of the Calpine parties. I therefore award the Calpine applicants parties costs in the amount of $15,000 against each of Khanjee and Catalyst plus one half of their reasonable disbursements.

Order accordingly.

End of Document

TAB – 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Blaze Energy Ltd. v. Imperial Oil Resources | 2014 ABQB 509, 2014 CarswellAlta 1498, 244 A.C.W.S. (3d) 32, [2014] A.W.L.D. 3990, [2014] A.W.L.D. 4065, [2014] A.W.L.D. 4066, [2014] A.W.L.D. 4073, [2014] A.W.L.D. 4077, [2014] A.W.L.D. 4079, [2014] A.W.L.D. 4080, [2014] A.J. No. 916 | (Alta. Q.B., Aug 15, 2014)

2008 ABQB 770
Alberta Court of Queen's Bench

Marathon Canada Ltd. v. Enron Canada Corp.

2008 CarswellAlta 2068, 2008 ABQB 770, [2009] A.W.L.D. 943, [2009] A.W.L.D. 944, [2009] A.W.L.D. 969, [2009] A.W.L.D. 970, 100 Alta. L.R. (4th) 356, 174 A.C.W.S. (3d) 62, 447 A.R. 89

Marathon Canada Limited (Plaintiff) and Enron Canada Corp. (Defendant)

T.F. McMahon J.

Heard: December 10, 2008
Judgment: December 17, 2008
Docket: Calgary 0201-07692

Proceedings: additional reasons to *Marathon Canada Ltd. v. Enron Canada Corp.* (2008), [2008] A.J. No. 1113, 2008 ABQB 408, 2008 CarswellAlta 1399, 97 Alta. L.R. (4th) 137, T.F. McMahon J. (Alta. Q.B.) [Alberta]

Counsel: James L. Lebo, Q.C., Donald W. Dear, James P. Flanagan, Charles P. Russell, Q.C. for Plaintiff
Dalton W. McGrath, A. Robert Anderson, Q.C., Michael W. McCachen, Jason M. Holowachuk, Duffern Harper, Michael C. O'Brien, Melanie R. Gaston, Christopher A. Petrucci for Defendant

Subject: Civil Practice and Procedure; Natural Resources; Contracts

ASSESSMENT of costs related to judgment reported at *Marathon Canada Ltd. v. Enron Canada Corp.* (2008), [2008] A.J. No. 1113, 2008 ABQB 408, 2008 CarswellAlta 1399, 97 Alta. L.R. (4th) 137, T.F. McMahon J. (Alta. Q.B.) [Alberta], granting plaintiff's damages in action.

***T.F. McMahon J.*:**

1 By Reasons for Judgment dated July 2, 2008, Marathon Canada Limited's ("Marathon") claim for $560,007.94 was allowed, plus interest. Enron Canada Corp.'s ("Enron") counterclaim for damages up to approximately $126 million, including interest, was dismissed. Costs were to be spoken to.

2 Marathon is entitled to its costs. The other two Defendants by Counterclaim were represented by Marathon's counsel so there will be only one set of costs. Marathon makes a number of submissions for enhanced costs.

3 Marathon argues that the following tariff items in Schedule C of the Alberta Rules of Court, Column 5 should be increased:

1.1 Pleadings: From $3,500.00 to $25,000.00

3.1 Document Discovery: From $1,500.00 to $25,000.00

8 This Cost Application: From $2,000.00 to $5,000.00

10 Trial Preparation: From $10,000.00 to $50,000.00

12 Written Arguments: From $5,000.00 to $25,000.00

4 In addition, Marathon seeks second and third counsel fees for Trial and recovery of the Goods and Services Tax on all fee items.

5 To further increase its claim, Marathon then seeks to have a multiplier of three times applied to these increased costs based upon the complexity and duration of the case.

6 Finally, Marathon would then double that result based on an early offer of settlement it made as Plaintiff and Defendant by Counterclaim and pursuant to the compromise rules (Rule 165 and following).

7 Disbursements claimed exceed $1 million.

8 As an alternative, Marathon seeks a lump sum award for costs including disbursements and GST of $3.5 million.

Increase in Specific Tariff Items:

(a) Pleadings

9 Marathon claims $25,000.00 instead of the sum of $3,500.00 set by Column 5 of Schedule C of the Rules. The pleadings here were numerous. Enron's Statement of Defence and Counterclaim to which Marathon responded was amended four times over four and a half years. There were five demands for particulars and replies to each. The pleadings were also lengthy. The last amended Reply and Statement of Defence and Counterclaim was 27 pages in length. The issues pleaded and answered were complex and required skill and care in drafting. These were not "boilerplate" pleadings as in a debt or automobile accident claim. Clearly, $3,500.00 would be inadequate.

10 I set Marathon's costs for pleadings at $20,000.00

(b) Document Discovery

11 The records show a total of 21 Affidavits of Record exchanged between the parties. I am told that production exceeded 15,000 pages. The tariff item 3(1) amount of $1,500.00 is wholly inadequate. Marathon seeks $25,000.00. Marathon cites *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 427 (Alta. Q.B.) where the Court accepted the parties agreed sum of $10,000.00 for document discovery. That, too, was a multi-million dollar action and apparently involved more than 18,000 pages of documents. Also cited is *Phillip (Next Friend of) v. Whitecourt General Hospital*, 2005 ABQB 174 (Alta. Q.B.) which awarded $10,000.00 for document discovery.

12 I set Marathon's costs for document discovery at $10,000.00.

(c) Trial Preparation

13 The tariff for Item 10 is $10,000.00 and Marathon seeks an increase to $50,000.00 on the basis of complexity and duration of the trial and the number of witnesses to prepare or be prepared for. Both *Klemke* and *Phillip* set this item at $50,000.00. Enron does not object to this amount, provided that it is not further increased by a general multiplier.

14 I then set Marathon's cost for Trial Preparation at $50,000.00.

(d) Written Argument

15 The tariff Item 12 provides for $5,000.00 on Column 5. Marathon seeks $25,000.00. Enron's written argument was 112 pages; Marathon's argument was 136 pages. Enron's reply was 114 pages and Marathon's was 44 pages. Enron referenced and filed 87 authorities and Marathon 47 authorities.

16 I wish to record that the written arguments from both sides were very helpful to the Court. They were clear, well-organized and addressed all the issues.

17 I will set Marathon's costs for this item at $20,000.00.

(e) This Costs Application

18 The tariff Item 8 is $2,000.00. I have written briefs in addition to a half-day of argument on this subject.

19 I set this amount at $5,000.00.

Second and Third Counsel Fees

20 The parties agree on the sum of $224,250.00 for 38 days of trial time based on single Column 5 and subject to Marathon's claim to a multiplier.

Pre-Trial and Case Management Conferences

21 Marathon claims for 24 such conferences at the Column 5 amount of $1,000.00 each. Enron objects that eight of the conferences required little time and were essentially scheduling meetings. The decision of this Court in *Castillo v. Go* (2000), 269 A.R. 361 (Alta. Q.B.) is cited.

22 I will accept Enron's characterisation of those eight conferences and reduce the cost awarded to $500.00 for each of those. Marathon is thus awarded $20,000.00 for this item, subject to any multiplier.

Miscellaneous Fee Items

23 Enron says there are several interlocutory applications for which Marathon claims costs when the Order expressly directed no costs. If that is the case, the Orders of course prevail. Similarly, when the Order awarded costs to Enron, those will be set off. Any dispute on this subject can be resolved by a taxing officer.

24 Enron further says that Marathon's Bill of Costs claims for Consent Applications. I cannot see that from the draft Bill of Costs presented to me, but if claimed, they are not allowable. I concur with the rationale on this point in *Diamond Park Builders Ltd. v. Conlee Construction Ltd.*, 2002 ABQB 470 (Alta. Q.B.).

25 Other issues raised regarding pre-trial motions can be resolved by a taxing officer, if necessary.

Goods and Services Tax on Costs

26 Marathon claims a recovery of GST on its costs. Rule 605(9) provides:

> Unless otherwise ordered by the court, a party entitled to costs is entitled to recover the goods and services tax on those costs upon providing a certificate in accordance with subrule (10) that is satisfactory to a taxing officer.

27 Marathon has complied with Rule 605(10). It will be entitled to recover the GST on its costs. See *Phillip* at para. 101.

28 The GST will be calculated on the full amount to be paid after a multiplier or doubling. Neither the Rule nor logic make any distinction between the base amount and the multiplied amount.

A Multiplier

29 Marathon argues for a multiplier of 3.0 to be applied to all tariff items under Column 5 of Schedule C, including those five items already increased in these reasons.

30 There is general judicial recognition that Schedule C, now ten years old, is a guide only and is seldom a fitting guide for complex and protracted civil litigation. There is also general acceptance of the principle that an award of costs should approximate 40 to 50 per cent of reasonable solicitor and own client costs. Two relevant authorities are *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.) and *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.).

31 It is, however, not usually possible to work backwards; that is, to determine reasonable solicitor and own client costs and then take a percentage. The actual fees paid by the client may be influenced by all manner of things not relevant to party and party costs B for example, a contingency or a bonus amount for success; the need to maintain or solidify the client on an on-going basis; time spent on only peripherally related matters such as the tax treatment of gains or losses. Of course, the other party also has no opportunity to challenge those fees.

32 So the better approach is to apply a multiplier to Schedule C, taking into account the factors discussed in *Trizec*, and see how that looks as against what little is known about the actual fees. Here, Marathon says that its solicitor and own client fees were approximately $3.6 million, plus disbursements. Marathon cites several cases which applied a multiplier. The first is *Murphy Oil Canada Ltd. v. Predator Corp.*, 2005 ABQB 134 (Alta. Q.B.). The *Murphy* case fixed costs at 6 times Column 5 in relation to dismissal of a counterclaim which totalled $3.242 billion. The solicitor-client fees were not much different from the case here.

33 *Klemke* fixed costs at 2 times Column 5. *Phillip* fixed costs similarly at 2 times Column 5. Also using the same multiplier were *Crossing Co. v. Banister Pipelines Inc.*, 2003 ABQB 792 (Alta. Q.B.) and *Dix v. Canada (Attorney General)*, 2002 ABQB 768 (Alta. Q.B.).

34 The *Murphy* case is unusual because of the magnitude of the risk created by the multi-billion dollar counterclaim.

35 This case before me exceeded the four cases cited above in one or more of several ways B duration, the sum claimed, the number of experts, the number of documents produced and the complexity of the issues.

36 For these reasons, and bearing in mind that no inflation factors have been applied since the 1998 establishment of Schedule C, I consider a multiplier of 3.0 times Column 5 to be appropriate.

37 However the multiplier will apply only to those tariff items not already increased by these reasons, namely pleadings, document discovery, trial preparation, written arguments, and this costs application. The basis for increasing these five items is essentially the same justification as used to apply a multiplier. By way of example, pleadings by Item 1.1 are set at $3,500.00 in Column 5. I have increased it more than five-fold to $20,000.00. A 3.0 multiplier applied to the increased amount would take it to $60,000.00 B an increase over Column 5 of 17 times. In my view, that kind of increase cannot be justified.

Marathon's Settlement Offer

38 On October 29, 2002, Marathon served an Offer to Settle on Enron. Its terms called on Enron to pay the full principle amount of Marathon's claim ($560,007.94) and to discontinue its counterclaim. In return, Marathon would waive its claim to interest and costs. The offer was withdrawn on December 16, 2002. Marathon's Statement of Claim had been filed only five and a half months before the offer was made and Enron's Amended Statement of Defence and Counterclaim only one month before. No examinations for discovery had occurred. One Affidavit of Records had been filed by each of Marathon and Enron. There had been two contested applications and two special applications. One month after its Offer to Settle, Marathon made its first demand for Particulars of Enron's counterclaim.

39 Marathon argues that its offer to waive costs and interest at that point was worth about $45,000.00 before the application of any multiplier. Given that Marathon recovered interest and costs at trial, Marathon both as Plaintiff and as Defendant by counter-claim invokes the benefit of Rule 174 which provides:

174(1) Where a plaintiff does not

(b) with respect to an offer of judgment made under Rule 169, recover a judgment more favourable than the judgment offered therein,

the judge or the Court of Appeal shall, unless for special reason, award costs to the defendant for all steps in relation to that claim after the service of notice.

174(1.1) When costs are payable to the defendant under subrule (1) and the action is dismissed entirely, those costs shall, unless for special reason, be double the amount of costs (excluding disbursements) the defendant would otherwise have recovered for all steps in relation to the defence after the service of the notice of payment or the offer.

174(2) Where a plaintiff, with respect to the matters specified by him in his offer to settle under Rule 170, recovers a judgment equal to or more favourable than the judgment offered, the judge or the Court of Appeal shall, unless for special reason, award the plaintiff double the amount of costs (excluding disbursements) he would otherwise have recovered for all steps in relation to the claim after the service of the offer.

40 So absent any "special reason", Marathon argues that double costs follow.

41 Enron argues that the compromise offer by Marathon was not a genuine offer to settle so Rule 174 cannot be invoked. The basis for that argument is two fold: (1) that the offer was made at a very early stage of the proceedings, that is, before the examinations for discovery, and thus before Marathon could possibly know the strength of the counter-claim, and (2) the offer called for Enron to abandon its counter-claim, then at about $93 million, and to pay the full amount of Marathon's claim and so represented no element of compromise.

42 The prevailing authority in this jurisdiction is *Allen (Next Friend of) v. University Hospitals Board*, 2006 ABCA 101 (Alta. C.A.) at paras. 14 -17:

[14] In every case where double costs are claimed under Part 12 on the basis of an unaccepted offer of settlement, the court must determine if the offer was genuine. As a general rule, for an offer of settlement to qualify as a genuine offer it must have been one that was reasonable and realistic in all the circumstances current at the time it was served and remained open.

[15] To be genuine, an offer of settlement made pursuant to Part 12 must include an element of compromise: ***Re Blue Range Resources Corp.*** (2000), 281 A.R. 351 (C.A.), 2001 ABCA 177 at para. 1. An offer to settle for the full amount of a liquidated claim plus judgment interest and costs to the date of service of the offer cannot be characterized as a genuine offer as it lacks an element of compromise: ***Labbee v. Peters***, *supra*. Likewise, an offer to accept the full amount of a trial judgment plus interest and costs to the date of service is not a genuine offer to compromise an appeal: ***Blue Range,*** *supra* at paras. 11 and 13. The addition of an offer to forego costs that may be incurred after service of the offer does not introduce an element of compromise. Where a settlement offer does not contain an element of compromise, the court may nevertheless consider it to have been reasonable in the circumstances and exercise its discretion to award enhanced costs.

[16] An offer of settlement that does not realistically reflect the relative merit of the parties' positions at the time it is made is not a genuine offer. It is one made without any reasonable expectation that it will be accepted and for the sole purpose of invoking the double costs sanction: ***Kerr v. Kerr*** (2000), 293 A.R. 384 (C.A.), 2001 ABCA 152. Such an offers is merely a no-risk litigation strategy or tactic.

[17] The assessment of an offer's genuineness is not confined to a consideration of whether it was made honestly and in good faith. The fact it contains an element of compromise, although necessary and relevant, may not be determinative. The genuineness of an offer must be assessed as at the time it was served and remained open and its character cannot be decided by simply comparing it to the result of the trial or appeal. That is only one factor to be considered. Other factors that may be relevant include the amount or nature of the settlement offer relative to the relief claimed or the judgment at trial, the relationship of the proposed settlement to an objective view of the relative merit of the positions of the parties, and the timing of the offer in relation to the commencement of the trial or hearing of the appeal. None of these factors,

> or any other single factor, is necessarily conclusive. An assessment of whether an offer was or was not genuine requires an examination of all of the surrounding circumstances, subjective and objective, existing at the time the offer was served and remained open, as well as the outcome of the trial or appeal.

43 The result is that before an offer can be considered to be one within the meaning of Rule 174 it must first clear the threshold test of genuineness. Only then will the question of "special reason" arise. If there is no genuine offer, then Rule 174 does not come into play.

44 As to when an offer would be considered to have been genuine, *Allen* and the authorities relied upon there require that the offer be reasonable and realistic in all the circumstances at the time, and that it include an element of compromise. An offer is not genuine if it does not realistically reflect the relative merits of the parties positions when made and if, viewed objectively, it was made without any reasonable expectation that it would be accepted and was instead made for the sole purpose of invoking the double costs sanction.

45 With respect, I would not condemn an offer merely because it is a litigation tactic. There is much in our adversarial system that is tactical and still legitimate, for example a decision to not call certain evidence or read in certain discovery or plead certain issues. The double costs awards are designed to discourage frivolous claims. Their use is a legitimate tactic to accomplish that end. When, for example, an action has no obvious merit, such as one that might attract an application for summary judgment, the sanction of double costs may be appropriate even if the offer is only to waive future costs and interest.

46 Nevertheless, the determination of an offer's genuineness needs to be made. Here the offer was made at a very early date B before any examinations for discovery had occurred and when only two Affidavits of Records had been filed (of 21 eventually filed). Marathon could have known very little about the strength of Enron's counter-claim at that stage. Marathon could not at that time have realistically expected Enron to abandon its very substantial counter-claim without any recognition of its possible merit.

47 There is some judicial debate about the necessity for an element of compromise for an offer to be genuine. *Allen* at para. 15 said plainly that it was necessary. However, *Jones v. Trans America Life Insurance Co. of Canada* (1996), 184 A.R. 120 (Alta. C.A.) has been cited as questioning that proposition: *Nagy v. Canada*, 2007 ABCA 58 (Alta. C.A.) at para. 7. With respect, I view *Jones* as saying that a Plaintiff's offer to accept the full amount, plus interest and costs (or conversely, a Defendant's offer to pay the same) and so waive future interest and costs can be a compromise where the offeror has a "solid case". So it is not that a compromise is sometimes not necessary; it is that a waiver of future costs and interest will in some cases be a sufficient compromise to attract a double costs award.

48 At the risk of over-simplification, one might say that the greater the objective risk of loss, the greater the compromise required for an offer to be genuine.

49 There may be occasions when an offer made at an early stage would be found to be genuine. A simple debt claim involving a few documents and uncomplicated facts may be one such occasion. But combining the early offer here with the abundance of relative documents still undisclosed and the quantity of facts not then tested or revealed by examination for discovery leads me to conclude that the offer was not a "genuine" offer in the sense that is now required for Rule 174.

50 Marathon relies upon *Meyer v. Partec Lavalin Inc.*, 2002 ABCA 114 (Alta. C.A.), a decision of the Alberta Court of Appeal which predates *Allen*. That decision, however, confirms that for Rule 174 to be invoked, the offer must be a genuine offer of compromise. The offer under consideration there was a simple offer to waive costs and was found to be a genuine offer. The rationale, however, at para. 9 is not inconsistent with *Allen*:

> At the time Lavalin made its Offer of Judgment, several important steps in the litigation had been completed, including closure of the pleadings, document discovery, cross-examination on the Affidavit of Production, and two full days of examinations for discovery. An offer to forego those costs in the context of this action is an offer to forego a significant amount of money. It is a genuine offer.

51 In the result, Marathon is not entitled to double costs.

Disbursements

52 A number of issues arose regarding disbursements. Marathon claims disbursements of $902,806.01 CDN and $131,541.14 US.

53 Rule 600(1) includes "all the reasonable and proper expenses" as recoverable costs. There are 5 areas of dispute:

1. Photocopying and laser printing charges: $70,247 plus GST

The claim represents more than 440,000 pages at a cost varying between 10 cents and 25 cents per page.

The cost of copying drafts is not recoverable; nor is the cost of copying documents such as pleadings, motions and affidavits compensated under another item in the costs schedule: *Millott Estate v. Reinhard* (2002), 322 A.R. 307 (Alta. Q.B.). I have no particulars of these copies. I will fix the recoverable disbursement at $30,000.00, based upon 200,000 copies at 15 cents per page, plus GST to be added.

2. Computer research: $19,474.00 plus GST

Most authorities do not permit recovery of the cost of computer research on the basis that it is already covered by the fee portion of Schedule C: *Sidorsky v. CFCN Communications Ltd.* (1995), 27 Alta. L.R. (3d) 296 (Alta. Q.B.) at para. 24; *Pauli v. ACE INA Insurance*, [2003] 11 W.W.R. 74 (Alta. Q.B.) at para. 68.

This claim is not allowed.

3. Travel expenses of in-house counsel: $28,110.00 US

Two persons from Marathon's legal department in the United States attended from time to time at examinations for discovery and throughout trial. It is argued they were there to assist and instruct counsel.

Given the magnitude of the claim, it was in my view reasonable for Marathon to have its employed counsel attend from its American parent's office: *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1990), 105 A.R. 384 (Alta. Q.B.); *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.) at para. 17.

Had these counsel been outside law firms engaged for a second or additional opinion, the result might be different: *Murphy Oil Canada Ltd. v. Predator Corp.*, 2005 ABQB 134 (Alta. Q.B.) at para. 42-43.

This claim is allowed.

4. Deliveries: $2,996.53 plus GST.

These are mainly courier charges. Given the bulk of the documents produced, the fact that many witnesses were not resident in Calgary and the duration of the litigation, I allow this claim: *MacCabe v. Westlock Roman Catholic Separate School District No. 110*, 1999 ABQB 666 (Alta. Q.B.) at para. 149.

5. Trial court reporter for daily transcripts: $28,679.90 plus GST.

Several cases have disallowed such claims: *Lauzon v. Davey*, 2007 ABQB 121 (Alta. Q.B.); *H. (S.G.) v. Gorsline*, 2001 ABQB 671 (Alta. Q.B.). Others have allowed that recovery: *Millott Estate*, *Sidorsky*.

Here, the daily transcripts were a valuable tool for counsel in preparing for both examination in chief and cross examination. An electronic copy was provided to me which gave me an important search capability. In document intensive and complex trials, the use of real time reporting is to be encouraged. I allow this claim.

54 If other disbursements are not agreed upon, they can be resolved by a taxing officer.

Order accordingly.

TAB – 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Condominium Corp. No. 9813678 v. Statesman Corp. | 2010 ABQB 501, 2010 CarswellAlta 1783, [2011] 2 W.W.R. 134, 92 C.L.R. (3d) 228, 28 Alta. L.R. (5th) 291, 489 A.R. 37, [2010] A.W.L.D. 4343, [2010] A.W.L.D. 4381, [2010] A.W.L.D. 4414, [2010] A.W.L.D. 4420, [2010] A.W.L.D. 4421, [2010] A.W.L.D. 4496, [2010] A.W.L.D. 4550 | (Alta. Q.B., Jul 26, 2010)

2007 ABQB 427
Alberta Court of Queen's Bench

Klemke Mining Corp. v. Shell Canada Ltd.

2007 CarswellAlta 847, 2007 ABQB 427, [2007] A.J. No. 693, [2008] A.W.L.D. 589, [2008] A.W.L.D. 591, [2008] A.W.L.D. 592, 159 A.C.W.S. (3d) 509

Klemke Mining Corporation (Plaintiff) and Shell Canada Limited, Chevron Canada Resources Limited, Western Oil Sands Inc. and Albian Sands Energy Inc. (Defendants)

L.J. Smith J.

Heard: May 11, 2007
Judgment: June 22, 2007
Docket: Edmonton 0103-16961

Proceedings: additional reasons to *Klemke Mining Corp. v. Shell Canada Ltd.* (2007), 2007 CarswellAlta 349, 2007 ABQB 176 (Alta. Q.B.)

Counsel: Peter P. Taschuk, Q.C. for Plaintiff
Andrea L. Froese for Defendants

Subject: Civil Practice and Procedure; Natural Resources; Contracts; Property

ADDITIONAL REASONS on costs to judgment reported at *Klemke Mining Corp. v. Shell Canada Ltd.* (2007), 2007 CarswellAlta 349, 2007 ABQB 176 (Alta. Q.B.), allowing action for damages for breach of contract.

***L.J. Smith J.*:**

1 After a trial, I found for the plaintiff on this breach of contract action. The plaintiff now seeks and adjustment for GST on the loss, a determination of the multiplier to be applied to costs and a finding in relation to disputed photocopying costs.

Background

2 The damages awarded at trial were $21,805,122 for mining services and $200,000 for consulting services for a total of $22,005,122.

3 No formal judgment has been entered.

4 The parties are agreed on the Schedule C fee portion of the costs, including an increase from $1,500 to $10,000 for document production and an increase from $10,000 for $50,000 for trial preparation.

5 Further, they are agreed to doubling of costs after a certain point due to the operation of the Alberta Rules of Court pursuant to a Formal Offer made under them.

6 As well, they are agreed as to disbursements of $283,252.37, without photocopying, and as to GST on disbursements.

GST on the Award

7 The parties agree that I am not *functus* as formal judgment has not been entered. The case law provided supports their position: *Begro Construction Ltd. v. St. Mary River Irrigation District* (1994), 167 A.R. 164 (Alta. Q.B.); *Oppenheim v. Oppenheim* (1996), 194 A.R. 317 (Alta. Q.B.); *Stamp v. McIntosh* (1998), 225 A.R. 76 (Alta. Q.B.).

8 The quantum of the GST sought by the plaintiff is about $1,320,300, calculated on the damages relating to mining work and the consulting fee. The plaintiff cites *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.) for the proposition that the effect of taxation must be taken into account in order to ensure sufficiency of a damages award. The plaintiff states that it was the plaintiff's oversight not to have argued entitlement to GST on the damage award at the trial.

9 The parties agree on the operation of the law in relation to GST on damage awards. Section 182 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 obliges the party receiving damages for breach of contract for supply of services to account to Revenue Canada. Because an award of damages has been given, the plaintiff asserts that it will be required to account to Revenue Canada for GST on the amount awarded, but the amount awarded at trial does not include a GST adjustment. Therefore, maintains the plaintiff, if the award is left unadjusted for GST, it will fail to place the plaintiff in the position it ought to have been in but for the breach of contract, citing as an example, *Ravelston Corp., Re*, [2006] G.S.T.C. 125 (Ont. S.C.J.).

10 The defendants do not dispute the plaintiff's interpretation of the *Excise Tax Act*. However, they argue that after 32 days of trial, I ought not to increase the award at this late stage; although the Court has discretion at this point to reconsider its judgment, the need for finality dictates that such discretion should be exercised sparingly: *MLH & A Inc. v. Shepp* (1997), 208 A.R. 387 (Alta. Q.B.). Further, they submit that there is insufficient evidence on which to base an award of GST. They cite *Kordish v. Innotech Multimedia Corp.*, [1999] G.S.T.C. 51 (Ont. S.C.J.), in which Campbell J. declined to increase an award for GST after damages had been awarded. However, I note that although the Court in that case was concerned about the lack of evidentiary basis as to GST status, the damages in that case were in lieu of notice on a contract of employment, and Campbell J. was "far from satisfied" that GST would be payable in the circumstances.

11 Certain conditions precedent must be fulfilled under s. 182 before GST will be deemed payable. The party receiving the award must be a registrant. The services compensated for must be taxable services.

12 Generally speaking, entities providing commercial services are registrants. Clearly both parties to this litigation fall within the definition of registrant. The evidence in this trial particular to KMC's finances shows GST adjustments which is evidence of its status as registrant.

13 The mining and consulting services are taxable, not zero rated. The evidence supports a conclusion the services provided by KMC are taxable.

14 As well, the evidence in this trial supports an inference that the work which was done by North American in lieu of KMC was subject to GST. Further, the contract between the defendants and North American did not provide for GST, leaving it to the operation of the law.

15 None of the evidence on the cost of mining services used to calculate damages included an adjustment for GST. I am satisfied the award at trial was exclusive of GST, and that in order to put the plaintiff in the position of the contract being honored, the award ought to be adjusted for GST. In my view, the reason it was not argued was solely oversight, arising from the distractions of the complexity of costing mining services. It was an obvious error. In my view, there was sufficient evidence adduced at trial upon which I can conclude that s. 182 will apply, and I find that refusal to accede to the plaintiff's argument would precipitate a miscarriage of justice.

16 The defendants argue that to award GST now would amount to a windfall. I disagree for the reasons already given.

17 The defendants argue that further evidence would be required to clearly address the question of whether the service rates included or excluded GST, and that it is not proven that the parties are GST registrants. The defendants complain that they did not have the opportunity to cross-examine on the issue, but they do not assert that they have any evidence to rebut the inference which is logically drawn from the evidence, nor do they apply to re-open the evidence. In my view, the evidence is clear in relation to whether GST is included. The plaintiff's expert witness' definition of income and his evidence make plain the assumptions made and conclusions reached on his loss calculations. GST was not a factor. The rest of the evidence in this trial supports such a conclusion. In my view, it is untenable to suggest on the evidence before me that the parties are not GST registrants.

18 Further, GST moves by operation of law. In my view, the failure to expressly plead it in this case is not fatal, particularly given my findings on the evidence at trial that the conditions for payment were fulfilled.

19 I find, therefore, that the award of damages for breach of contract for mining and consulting services shall be adjusted for GST.

Multiplier

20 The plaintiff maintains that even with the increase over the amount in Column 5 of Schedule C for Document Production and for Trial Preparation, the net fee is inadequate for this lawsuit. The plaintiff maintains that a multiplier of between 2 and 3 ought to be applied, citing *P. (M.N.) (Next Friend of) v. Whitecourt General Hospital* (2005), 381 A.R. 234 (Alta. Q.B.) [hereinafter Phillip] and *Citadel General Assurance Co. v. Lloyds Bank Canada* (1993), 12 Alta. L.R. (3d) 114 (Alta. Q.B.), both of which used doubling of costs as a starting point, and then adjusted on consideration of various relevant factors. The plaintiff further cites as being somewhat comparable: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* (1999), 251 A.R. 101 (Alta. Q.B.) and *LSI Logic Corp. of Canada Inc. v. Logani* (2001), 100 Alta. L.R. (3d) 49 (Alta. Q.B.). In particular, the plaintiff submits that the present case is similar to *Trizec Equities Ltd.* in terms of the defendants' strategy significantly contributing to the length and complexity of the case.

21 The defendants concede that a multiplier is appropriate, but maintain that it ought to be in the range of 1.5 to 2. They argue that there is no uniform approach whereby the courts use doubling as a starting point, citing *Westline Oilfield Construction Ltd. v. Petromet Resources Ltd.* (2002), 324 A.R. 339 (Alta. Q.B.) and *Allen (Next Friend of) v. University Hospitals Board* (2000), 276 A.R. 345 (Alta. Q.B.).

22 They submit that *Trizec Equities Ltd.* is distinguishable in that it was a much more complex, lengthy and voluminous case, and *LSI Logic Corp. of Canada Inc.* was a case where the Court found malfeasance and abuse of process. Even *Phillip*, where the Court applied a multiplier of 1.75 was plagued by unnecessary parties, extensive document production and two sets of written and oral arguments.

23 I agree that Schedule C, Column 5 costs are insufficient for a case of the length and complexity of this case. I have broad discretion under Rule 601(1) to determine the appropriate award of costs.

24 Both parties prefer the multiplier approach to an approach used in some case law which premises quantum of party-party costs at a portion of the solicitor client costs.

25 In *Trizec Equities Ltd.*, Mason J. found that Schedule C costs did not achieve an appropriate level of costs in the majority of cases involving complex and protracted litigation. The Court outlined concerns with simply applying a multiplier to Schedule C in complex cases, including a failure to address the thousands of pages of exhibit documents often characteristic of such litigation, computer support requirements, and the monopolization of counsel's time often for months before, and then months during, trial. The Court then noted at para. 30 that the Schedule C Committee determined "...that an award of costs should, generally speaking, approach the 50% mark." After citing an attack made by the defendants upon Trizec's operations over the last 15 to 20 years, the Court determined at para. 32 that "...a costs award based on a 50% recovery level would be inadequate..." and instead awarded costs "...in an amount equal to 60% of what will be assessed as appropriate solicitor client costs."

26 In *LSI Logic Corp. of Canada Inc.* a similar approach was taken with quantum of costs set for different parties at 2/3 and 1/3 of their respective solicitor and client costs, to be taxed.

27 In *Phillip*, the court preferred the multiplier method of quantifying costs over the *Trizec Equities Ltd.* approach.

28 For this case, I prefer the multiplier approach endorsed by *Phillip* but find the *Trizec Equities Ltd.* approach useful as a check to ensure the effect of the multiplier chosen is within the broad, and less certain range set by how a solicitor bills a client. The solicitor client bill in the case at bar has not been taxed, and so the comparative measure is less weighty than it would be if it had been taxed.

29 In this case, plaintiff's counsel asserts that KMC paid fees of $2.2 million by just after the end of trial. I have the assertion of counsel on this point, which I do not doubt. An assessment of the reasonableness of that fee cannot be done. Nevertheless, it stands as a fee billed and paid.

30 The defendant maintains that the agreed increased fees for document production and for trial preparation ought to reduce the multiplier. The plaintiff answers that the assessment in Schedule C of $1,500 for Document Production represents only one Affidavit of Records. In this matter there were four or five Affidavits of Records. Therefore, the increase in the amount for Document Production does not adequately reflect the fees and should not affect the multiplier, argues the plaintiff. While I note this point, and, in my view, these increases are small in the context of the quantum of costs, nevertheless, they are relevant considerations to the question of the appropriate multiplier.

31 Other relevant considerations are the CO18 issue which increased the complexity of the trial through a large increase in documentation. The defendants' position that satisfactory performance of CO18 was a precondition to the KMC receiving the contract at issue was rejected. A finding was made that the defendants consciously embarked upon a course action to breach their agreement with KMC. The CO18 issue raised by the defendants was part of that process. Some disclosure relevant to that issue was not made until 2006. All of these circumstances made the trial more complex. The plaintiff calculated that this issue alone added over 18,000 pages of documents.

32 Disclosure was difficult in this case, particularly for the defendants since their documents were in many different hands. Nevertheless, it is relevant that the defendants failed to adhere to any disclosure deadline set in case management, and some disclosure did not arrive until early in the trial. This also added to the complexity of the trial.

33 Turning to the trial, the plaintiff prepared approximately 500 briefing binders for 22 lay witnesses, 5 expert witnesses and 5 witnesses who did not testify. The trial occupied about 32 days of trial time producing about 4,500 pages of transcript.

34 The damages portion of the trial was exceedingly complex, but because of prior adjournments of the trial, the parties' expert witnesses had sufficient opportunity to significantly narrow the issues between them.

35 Other than the plaintiff and the defendants, all of whose interests were in alignment, there were no other parties nor was there a counterclaim.

36 While the defendants' refusal to pay KMC for its work on CO18 while also not honoring the agreement between them put financial strain on the plaintiff, there is no evidence that KMC was nearing bankruptcy.

37 There was no written argument here.

38 In my view, *Trizec Equities Ltd.* was a more complex case. Further, I am not willing to infer any malfeasance, which is in part what motivated the conclusion in *LSI Logic Corp. of Canada Inc.*.

39 *Phillip* was a medical malpractice case with two sets each of oral and written argument. Fourteen expert witnesses testified and the trial took 10 weeks. While it took longer to try, in my view, it was, generally, of similar complexity.

40 In the case at bar, daily transcripts were available, were used extensively during the trial and by the court, and a transcript of oral argument was required and relied upon.

41 In all of the circumstances, I find an appropriate multiplier is 2.0. The case was run cleanly and concisely by the plaintiff despite the above noted difficulties. The defendants assert that they should not be penalized for disclosure problems which were beyond their control and for running a vigorous defence. However, by the same token, the plaintiff should not be penalized through the very significant costs necessarily incurred to pursue a complex lawsuit in which it was ultimately vindicated. The Court must exercise its costs discretion judicially to achieve an equitable and fair result in each case.

42 Unlike *Phillip*, I can find no reason to reduce from a multiplier of 2.0. As a check, the plaintiff submits that a costs recovery of $1.1 million, or 50% of the untaxed solicitor client bill, would be the equivalent of a multiplier in the range of 2.8. 40% recovery is the equivalent to a multiplier in the range of 2.2. In my view, to apply a multiplier of less than 2 would result in an inadequate costs award. In all the circumstances, I am of the view that a multiplier of 2 is appropriate.

Photocopying

43 The internal photocopying charged by the plaintiff's counsel was reduced from $.20 to $.15 per page for this matter, and after the first 28,875 pages it was further reduced to $.10 per page. Color photocopying was reduced from $.40 to $.15 for this client. Despite these reductions, the photocopying expense came to $55,556.35, which consisted mostly of non color photocopying.

44 The plaintiff concedes that a further reduction of about 5 percent for letters and non recoverable items (allowing in effect for 27,000 copies) is fair, and further a 5 percent reduction for labour efficiencies due to photocopying of bundles is not unfair. The plaintiff notes that wherever possible, materials were recycled as opposed to re-copied.

45 The defendants maintain that the increase in the Document Production and Trial Preparation fee items ought to compensate considerably for the cost of photocopying, which is a fee item as well: Law Society of Alberta, *Code of Professional Conduct*, Ch. 13 — Fees; *Dechant v. Stevens*, [2001] A.J. No. 373 (Alta. C.A.) at para. 25. They note that in a number of cases, no photocopying disbursement was allowed: for example *Phillip* at paras. 106, 107. Further, drafts ought not to be charged in addition to the items conceded by the plaintiff. The defendant suggests $10,000 to $20,000 be granted for photocopying, referring to *Millott Estate v. Reinhard* (2002), 322 A.R. 307 (Alta. Q.B.) at paras. 72 and 74.

46 I disagree that the increases in the two fee items include a significant quantum for photocopying. This was a document heavy case. The plaintiff's documents were exceedingly well organized and this was in part why this complex trial was tried quickly. Accordingly, and in all of the circumstances, my view is that a fair fee for photocopying is $40,000 with GST to follow.

Order accordingly.

TAB - 10

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Weatherford Canada Partnership v. Artemis Kautschuk Und Kunstoff-Technik Gmbh | 2018 ABCA 323, 2018 CarswellAlta 2138, [2018] A.W.L.D. 4956, 298 A.C.W.S. (3d) 713 | (Alta. C.A., Oct 3, 2018)

2018 ABQB 571
Alberta Court of Queen's Bench

Weatherford Canada Partnership v. Addie

2018 CarswellAlta 1501, 2018 ABQB 571, [2018] A.W.L.D. 4135, [2018] A.W.L.D. 4136, 26 C.P.C. (8th) 311, 297 A.C.W.S. (3d) 51, 75 Alta. L.R. (6th) 248

Weatherford Canada Partnership (Plaintiff / Respondent) and Dave Addie, David Anderson, Glen Kinnee, Ted Harland, Dan Endersby, Midfield Supply ULC, Midfield Supply International Ltd., Dale Denney, Douglas Golledge, John Letwinetz, Rick Endersby, Jakob Ambrosius, Artemis Kautschuk und Kunstoff-Technik GmbH, Wilhelm Kaechele GmbH, West Met Tools & Machinery Ltd., and Europump Systems Inc. (Defendants / Applicants)

D.L. Shelley J.

Heard: May 25, 2018
Judgment: July 31, 2018
Docket: Edmonton 0603-04628

Proceedings: additional reasons to *Weatherford Canada Partnership v. Addie* (2016), 2016 CarswellAlta 617, 2016 ABQB 188, J.B. Veit J. (Alta. Q.B.); affirmed *Weatherford Canada Partnership v. Kautschuk* (2017), 2017 ABCA 110, 2017 CarswellAlta 576, Brian O'Ferrall J.A., Ronald Berger J.A., Sheilah Martin J.A. (Alta. C.A.); leave to appeal refused *Weatherford Canada Partnership v. Artemis Kautschuk und Kunstoff-Technik GmbH, et al.* (2017), 2017 CarswellAlta 2550, 2017 CarswellAlta 2549, Abella J., Brown J., Côté J., Gascon J., Karakatsanis J., McLachlin C.J.C., Moldaver J., Rowe J., Wagner J. (S.C.C.); leave to appeal allowed *Weatherford Canada Partnership v. Artemis Kautschuk Und Kunstoff-Technik Gmbh* (2018), 2018 ABCA 323, 2018 CarswellAlta 2138, Jack Watson J.A. (Alta. C.A.)

Counsel: Kenneth Fitz for Applicant, Artemis Kautschuk and Kunstoff-Technik GmbH
Sylvia Jacob for Applicant, Wilhelm Kaechele GmbH
Fausto Franceschi, Ward Hanson, Simon Elzen-Hoskyn for Respondent, Weatherford Canada Partnership

Subject: Civil Practice and Procedure

APPLICATION for ruling on costs, additional reasons to judgment reported at *Weatherford Canada Partnership v. Addie* (2016), 2016 ABQB 188, 2016 CarswellAlta 617 (Alta. Q.B.).

***D.L. Shelley J.*:**

I. Background

1 Prior written reasons for decisions issued by this Court and by the Court of Appeal provide considerable background in relation to this lawsuit. For the purposes of this application and these reasons, however, it is not necessary to reiterate what was contained in those prior decisions and I will therefore restrict details to those that are pertinent to the issues raised in this application.

2 Weatherford is a company that manufactures and sells progressive cavity pumps. Weatherford purchased stators — necessary components of these pumps — from two German companies, Artemis and Kaechele. In April 2006, after some of Weatherford's former employees started a competing company, Weatherford commenced an action against several defendants involved in the creation of that competing company. Weatherford amended its statement of claim in April 2008 to include both Artemis and Kaechele as defendants.

3 Artemis and Kaechele successfully applied for summary judgment against Weatherford in 2016 on the grounds that Weatherford's action was limitation barred (*Weatherford Canada Partnership v. Addie*, 2016 ABQB 188 (Alta. Q.B.)). The Court of Appeal dismissed Weatherford's appeal (*Weatherford Canada Partnership v. Kautschuk*, 2017 ABCA 110 (Alta. C.A.)). Leave to appeal was denied by the Supreme Court of Canada on November 30, 2017. Artemis and Kaechele have now applied to recover their litigation costs.

II. Issue

4 The main issue before me is the quantum of costs which ought to be awarded to the successful parties, Artemis and Kaechele.

5 In determining the answer to this issue, I will address the various methods which have been employed in this province to calculate an appropriate costs award. These include a percentage indemnification, a multiple of Schedule C costs, and a hybrid approach.

6 In making this determination I will also have regard to the complexity and duration of the litigation, the remedy sought against Artemis and Kaechele, and Weatherford's conduct during the litigation.

III. The Parties' Positions

A. Artemis' Position

7 Artemis submits that it should receive a costs award in the range of 75% indemnity of its solicitor-client fees plus disbursements and GST (totalling $1,059,303), for an award of $831,603.

8 Artemis argues that, while a costs award is generally 40-50% of solicitor-client costs for complex and protracted litigation, in this case it is entitled to an increase in indemnification for misconduct and aggravating factors. Artemis argues that the following factors weigh in favour of 75% indemnification:

1. The litigation was especially complex and protracted;

2. Artemis faced a significant litigation risk, given that Weatherford claimed

   damages of approximately $290,000,000 on a joint and several basis;

3. Weatherford improperly asserted privilege over records that Weatherford should have disclosed at the outset of the litigation. Weatherford therefore unnecessarily increased the complexity, length, and expense of the litigation;

4. The litigation would have been shorter and less expensive had Weatherford disclosed records over which it claimed privilege (the Withheld Records) — which formed the basis upon which Artemis applied for summary judgment — at an earlier time; and

5. Artemis maintained its business relationship with Weatherford despite the litigation, which allowed Weatherford to continue to generate significant sales.

9 Artemis argues that the most appropriate approach to determine costs is to apply a percentage of indemnity costs. Schedule C values are only appropriate for "common stream litigation," not long trials and complex cases. Applying the percentage approach would allow the Court to avoid the fictional exercise of applying multipliers to set fees.

10 Alternatively, Artemis submits that it should receive a hybrid costs award calculated by combining i) solicitor-client costs for the period leading up to May 2014 when Weatherford disclosed the Withheld Records which allowed Artemis and Kaechele to apply for summary judgment and ii) a multiple of Schedule C, Column 5 taxable costs for the costs incurred after Weatherford produced the Withheld Records. Artemis calculates a hybrid costs award in the range of $663,248 to $792,298, which becomes a range of $790,958.94 to $926,461.44 with the inclusion of disbursements and GST.

11 In the further alternative, Artemis argues that the costs award should be based on a multiplier of Schedule C, Column 5 taxable costs. This approach produces costs awards ranging from $441,700 using a multiplier of two to $883,400 using a multiplier of four, which becomes a range of $530,962 to $994,747 when Artemis includes disbursements and GST.

B. Kaechele's Position

12 Kaechele submits that it should receive a costs award in the range of 75% of its costs on an indemnity basis, plus disbursements, other charges and GST (totalling $1,500,224), for an award of $1,125,167.69. Kaechele submits that the Court should determine the costs award in this way for the same reasons argued by Artemis.

13 Alternatively, Kaechele seeks a costs award calculated by combining i) Kaechele's costs on a full indemnity basis for the period before Weatherford produced the Withheld Records and ii) a multiple of Schedule C, Column 5 taxable costs for the costs incurred after Weatherford produced the Withheld Records. Specifically, Kaechele argues that a multiplier of four should be applied for the period that followed Weatherford's disclosure of the Withheld Records. Following this hybrid costs approach, the award of costs, including disbursements and tax, would amount to $940,931.49 using a multiplier of two, $1,023,581.49 using a multiplier of three, or $1,106,231.49 using a multiplier of four.

14 Kaechele argues that, if the Court applies the hybrid approach to calculate costs, it should award full indemnification for the period prior to Weatherford disclosing the Withheld Records, because Weatherford attempted to confuse the litigation and deceive the Court. Weatherford's misconduct lengthened the litigation, made it more costly for Kaechele, and wasted court resources. For the period after Weatherford disclosed the Withheld Records, Kaechele believes that the Court should apply a multiplier of four to Schedule C, Column 5 tariffs in order to deter misconduct.

15 In the further alternative, Kaechele submits that the costs award be determined by applying a multiplier to Schedule C, Column 5 taxable costs for the entirety of the litigation. This approach would produce an award of $550,698.19 using a multiplier of two, $785,890.69 using a multiplier of three, and $1,022,083.19 using a multiplier of 4. Kaechele argues that a multiplier of at least four should be applied if the Court follows the multiplier approach.

16 While Kaechele's position in the litigation is similar to that of Artemis, it seeks a larger costs award than Artemis because Kaechele changed from retaining Alberta counsel to retaining a bilingual law firm based out of Germany in 2013. Kaechele argues that this change was necessary because Kaechele needed help understanding the procedural and legal aspects of the litigation in the Canadian legal system and it had to overcome linguistic and cultural barriers. Kaechele suggests that Artemis may not have faced the same challenges because Artemis' director and key witness is an American national, while Kaechele's leadership and key witnesses are German residents whose native language is German. Kaechele submits that it should be reimbursed for travel and accommodation costs of counsel because those costs are "reasonable and proper".

C. Weatherford's Position

17 Weatherford submits that the Court should calculate costs awards for Artemis and Kaechele by applying a multiplier of two to the Schedule C, Column 5 tariffs. Following this approach, Weatherford claims that Artemis should receive $463,988.25 and Kaechele should receive $436,173.57.

18 Weatherford argues that the most appropriate and commonly used approach for determining a costs award is to apply a multiplier to Schedule C costs. Weatherford further submits that using a multiplier of Schedule C costs is appropriate when the complexity of the litigation warrants it, when the amount in dispute significantly exceeds $1.5 million, or when one of the

parties engages in misconduct. Courts are generally hesitant to follow the percentage of indemnity approach to determining costs awards because of the unreliability of un-taxed solicitor-client costs. While Weatherford admits that the multiplier approach may be ill-suited to long trials, Weatherford also points out that in this case, a trial was scheduled but never held.

19 Weatherford submits that, in complex and protracted litigation, courts have referred to 40-50% of indemnification as a reasonable benchmark for costs awards. Courts only award costs in a proportion greater than 40-50% indemnity in exceptional circumstances where the unsuccessful party engaged in reprehensible conduct. Weatherford argues that it engaged in no such misconduct, so the costs award should be determined by applying a multiplier of two to Schedule C costs.

20 Weatherford contends that a higher percentage of indemnity would be inappropriate in this case for the following reasons:

1. Weatherford's withholding of records was not misconduct because its legal counsel assessed the records as privileged, and Weatherford disclosed the records when ordered to do so;

2. Litigants should not be intimidated by the prospect of elevated costs when deciding whether a document is privileged;

3. The Court imposed no sanction against Weatherford when it ordered production in 2014, indicating that it did not see Weatherford as having engaged in serious misconduct;

4. Artemis and Kaechele mischaracterized the extent to which Weatherford withheld records. None of the parties had included records relevant to the issue of damages in their initial Affidavits of Records because they had all agreed to set that issue aside and only address liability between December 2006 and September 21, 2009;

5. Artemis and Kaechele overemphasized Weatherford's role in delaying the litigation by failing to disclose its Withheld Records. Artemis and Kaechele allegedly had the information needed to apply for summary judgment even before Weatherford disclosed the Withheld Records;

6. Artemis and Kaechele share blame for delaying the litigation. They did not set down their summary judgment application until March 4, 2016, even though they had received the Withheld Records by June 17, 2014; and

7. The fact that Weatherford maintained its business relationship with Artemis and Kaechele while contemplating and commencing litigation against them does not support enhanced costs. There is no need to award enhanced costs to Artemis when Artemis benefitted by continuing to sell its products to Weatherford.

21 Weatherford submits that a high percentage of indemnity is inappropriate because Artemis and Kaechele involved themselves in a limited way in the litigation. While the litigation was complex, Artemis and Kaechele did not carry the burden. For example, those parties' engagement in Questioning was minimal.

22 Weatherford argues that, regardless of the approach that the Court follows, the Court should account for the following in Artemis' and Kaechele's bills of costs:

1. Artemis and Kaechele each seek their untaxed solicitor-client costs ($1,059,303.39 and $1,500,223.58, respectively). The Court should give less weight to those untaxed values;

2. Kaechele incurred over 43% of its legal fees in the period that Kaechele says that it was moving promptly for summary judgment;

3. Kaechele's claimed costs are $440,920.10 greater than those claimed by Artemis. Since the parties faced the same challenges in the litigation, their costs should not differ;

4. Artemis and Kaechele failed to set out their unaltered single Column 5 costs, which the Court needs in order to have a neutral baseline;

5. Artemis and Kaechele over-claimed costs associated with specific items in their bills of costs; and

6. Kaechele claims the entirety of the costs incurred for its legal counsel's flights and accommodations, which is unreasonable.

IV. Authorities Relied On

A. Costs Awards Depend on Complexity and Duration of the Litigation, Party Misconduct, and/or the Remedy Sought in the Litigation

i. Full Indemnity or Solicitor-Client Costs

23 In *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118 (Alta. C.A.), the unsuccessful respondent (the original plaintiff) had sued the appellant for $55.7 million for interfering with the respondent's business. The litigation was complex and spanned over 15 years. The Court of Appeal granted the appellant party and party costs and determined the costs award by cross-referencing Schedule C fees with the appellant's solicitor-client bill, with adjustments for inflation. The Court noted that costs awards may be calculated in various ways when Schedule C fees are inadequate, including the use of "[a] higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some fraction of solicitor-client costs, and so forth" (para 4). The Court stated that "[t]he ultimate question is whether the final total is reasonable or not" (para 4).

24 In *Jackson v. Trimac Industries Ltd.* (1993), 138 A.R. 161, 1993 CarswellAlta 310 (Alta. Q.B.), aff'd 1994 ABCA 199 (Alta. C.A.), Justice Hutchinson awarded costs on an indemnity basis ("solicitor and his own client costs") to a partially successful plaintiff in his action against a former employer and a senior executive. The plaintiff had initially sought damages of more than $25 million, alleging wrongful dismissal, breach of an option agreement, breach of a shareholders agreement, and inducement of breach of contract (*Jackson v. Trimac Industries Ltd.* (1992), 134 A.R. 321, 1992 CarswellAlta 184 (Alta. Q.B.) at para 2). The defendants' misconduct included a calculated decision "to force [the plaintiff] to exhaust the legal proceedings to obtain that which was obviously his," giving unreliable evidence, and inducing a breach of contract (cite from *Jackson 1992* at 81).

25 Justice Hutchinson stated that, to award costs on a solicitor-client basis, "the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case" (para 28). Such rare circumstances arise where there is "an attempt to deceive the court and defeat justice, . . . where [parties] were guilty of positive misconduct [and] where others should be deterred from like conduct,... fraudulent conduct," or "an attempt to delay proceedings" (paras 32-37).

26 The applicants in *Stagg v. Condominium Plan 882-2999*, 2013 ABQB 684 (Alta. Q.B.), sought costs after receiving a Consent Order which directed that the respondent condominium corporation repay a deposit of $14,527. The applicants had paid the deposit on behalf of the respondent and the respondent refused to repay the deposit for over two years. The respondent's misconduct included "an attempt to hinder and delay the litigation, requiring the plaintiff to prove facts that should have been admitted, and failure to produce material documents in a timely fashion" (para 44). Ultimately, Justice Tilleman awarded the applicant full indemnification of costs to deter others from adopting similar conduct. Justice Tilleman noted that "this is not a case where the [respondent] asserted in good faith a legal position through established legal procedures, which legal position turned out to be erroneous" (para 63). This suggests that a good faith legal position may influence a court's finding as to the significance of a party's misconduct.

27 In *Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.* (1986), 48 Alta. L.R. (2d) 367 (Alta. Q.B.), 1986 CanLII 1771, the plaintiff sought costs after succeeding in its action to recover damages associated with the loss of its helicopter. Justice Veit found that the defendants engaged in serious misconduct by knowingly filing a fraudulent proof of loss in an attempt to recover insurance proceeds to which the plaintiff was entitled, negligently failing to consult their files, and delaying the production of "extremely material" records. Justice Veit awarded costs to the plaintiff on an indemnity basis.

28 In *Brown v. Silvera*, 2010 ABQB 224 (Alta. Q.B.), the applicant, Silvera, applied for solicitor and own client costs (full indemnity) on the basis of the respondent's misconduct, or alternatively, because a matrimonial property agreement provided for full indemnity of costs. Justice Moen had earlier awarded the applicant approximately $15.1 million after a long trial and protracted litigation over the division of matrimonial property. Justice Moen determined that the respondent's misconduct, in

and of itself, entitled Silvera to full indemnity of her costs. The respondent had deceived and mislead the applicant on financial circumstances and asset values, failed to appear at questionings, and refused to produce relevant documents. Justice Moen noted that the dispute "was not an honest difference between the parties but rather an attempt by [the respondent] to keep Silvera from what was rightfully hers" (para 44).

29 In *College of Physicians & Surgeons (Alberta) v. H. (J.)*, 2009 ABQB 48 (Alta. Q.B.), Justice Graesser considered the appropriateness of an award for full indemnification of costs after the College of Physicians and Surgeons (the respondent) successfully opposed an application to bar a doctor from continuing his role as an investigator of complaints for the College. Justice Graesser found that the applicants had engaged in serious misconduct during the litigation. They had attacked the credibility and integrity of the College's investigator and made baseless and unfounded allegations of dishonesty and fraud. Justice Graesser held that a full indemnity of legal costs was justified in order to discourage allegations of bias and dishonesty where no reasonable basis existed to support those allegations.

30 In the case of *Cooper v. Cooper*, 2013 ABQB 117 (Alta. Q.B.), the plaintiff had sought recovery of his share of pension benefits, which totalled $56,000. The respondent refused to divide the pension benefits or to provide information on those benefits for three years, forcing the plaintiff to sue the respondent to recover the proceeds. The respondent acted fraudulently and in breach of trust by converting pension benefits into her own name and then intentionally delaying and hindering the plaintiff from obtaining the proceeds. The Court found that this misconduct fell within the parameters set out in *Jackson* for justifying an award of solicitor-client costs. The Court awarded $15,000 in solicitor-client costs plus reasonable disbursements, which amounted to approximately 54% indemnity of costs.

31 In *Boyd v. JBS Foods Canada Inc.*, 2015 ABCA 191 (Alta. C.A.), the respondent employee had unsuccessfully applied to summarily dismiss his employer's appeal because the employer's counsel took no active part in the judicial review proceeding in the Court of Queen's Bench. In determining costs for that application, the Court of Appeal stated that "[f]ull-indemnity costs are reserved for serious situations, such as bad misconduct, or certain exceptional circumstances," and that the misconduct in this case did not rise to that level (para 3). The Court nevertheless awarded the successful appellant enhanced party and party costs under Column 4 of Schedule C, rather than Column 1, because the parties' arguments were complex and because the appellant's argument was unfounded and unfair.

32 In *Walsh v. Mobil Oil Canada*, 2008 ABCA 268 (Alta. C.A.), the respondent had originally alleged discrimination against her former employer. A human rights panel dismissed her claim, but she successfully appealed to the Court of Queen's Bench. She was again successful at the Court of Appeal except that a majority of the Court found that the trial judge erred by awarding her solicitor-client costs. The Court of Appeal confirmed that courts will generally only award solicitor-client costs in rare occasions where a party shows reprehensible, scandalous, or outrageous conduct. The majority of the Court found that, to justify solicitor-client costs, the misconduct must have occurred during the course of the litigation, and in this case, it did not.

ii. Percentage of Complete Indemnity Costs

33 In *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.), Justice Mason stated the general rule for costs awards, which is that, in the absence of "any misconduct on the part of the litigants . . . to award costs on a party and party basis" (para 20). In Alberta, this means that courts will generally award costs to "achieve indemnity in the range of 40% to 50%" (para 21). However, Justice Mason noted further that Schedule C is meant for the "common stream of litigation," and not for "complex and protracted litigation" (para 27). He stated that, when Schedule C does not provide an appropriate level of costs, such as cases that involve long and complex trials, a percentage of indemnity approach makes more sense than applying a multiplier to Schedule C fees. Applying these principles, Justice Mason awarded the successful defendants 60% of their solicitor-client costs. The enhanced costs award was justified because the plaintiff had sued the defendants for $20 million in damages, the litigation was complex and involved a 145-day trial, and the plaintiff engaged in misconduct by strategically seeking recovery from defendants who lacked adequate insurance coverage.

34 In *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.), the Court applied the percent of indemnity approach to determine costs. Because of the plaintiffs' "gloss of impropriety," the Court awarded LSI Canada "2/3 [or 66%] of

its solicitor and client costs" (para 16, 23). The Court had dismissed the plaintiff shareholders' application to strike fair value proceedings, which it found was an abuse of process and struck the plaintiffs' statement of claim that alleged oppression against the defendant, LSI Canada. The litigation was moderately complex and lengthy and LSI Canada faced substantial economic risk because the plaintiffs sought $40 million of damages in their oppression action. The plaintiffs had "breached the implied undertaking under Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose, as well as their express contractual undertaking not to use information disclosed in the fair value proceedings in any other litigation" (para 18).

35 Notably, the Court in *LSI Logic* dismissed the plaintiffs' claim that LSI Canada's actual costs were unreasonably high, noting that "a party that is sued 'is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice'" (at para 15, citing *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.) at 323, 1991 CanLII 2729). The Court awarded LSI Canada's directors and officers 1/3 [or 33%] of their solicitor and client costs, citing their minimal participation in the litigation as the reason for the lower costs award.

iii. Multipliers Applied to Schedule C to Determine Costs

36 The successful appellants in *Stewart Estate v. 1088294 Alberta Ltd.*, 2016 ABCA 144 (Alta. C.A.) applied for costs after 10 years of complex litigation that involved trial and an appeal against five respondents. In the respondents' initial action disputing the interpretation of several oil and gas leases, the respondents sought damages of $31.5 million (*Stewart Estate v. TAQA North Ltd.*, 2013 ABQB 691 (Alta. Q.B.)). There was no indication of misconduct and the appellants bested a formal offer for settlement as well as three informal offers. Ultimately, the Court of Appeal applied a multiplier of two to Schedule C, Column 5 tariffs to determine the appellants' costs award. The Court noted that the "[a]pplication of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million" (para 24). The Court stated further that "Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the complexity of the action warrants it, when the amount in dispute significantly exceeds the $1.5 million threshold for Column 5 or when the conduct of one of the parties warranted a multiplier" (para 25).

37 In *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.), Justice Schutz (as she then was) considered costs where the unsuccessful plaintiff claimed rights of first refusal with respect to oil and gas interests. The plaintiff had sought specific performance, which would have interfered with transactions worth a combined $968 million. Justice Schutz awarded costs against the plaintiff in the amount of 1.5 times the Schedule C, Column 5 tariffs based on the "importance of the outcome to [the] parties and the amount of money potentially involved" (para 81). She refused to apply a larger multiplier or to order a percentage of indemnity for solicitor-client costs because the litigation was neither complex, nor protracted, and the plaintiff did not engage in any serious misconduct. Justice Schutz noted further that widespread adoption of the percentage of indemnity approach to awarding costs "would undermine policy objectives, including the facilitation of access to justice, which underlined the adoption of a tariff approach to costs" (para 75).

38 The appellant in *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.), had sought damages of $2.5 million against the respondent for illegal diversion of water. The appellant amended its claim during the litigation to seek $25 million in damages. The claim failed at trial and the Court of Appeal dismissed the appeal. Altogether, the litigation involved a 27-day trial, multiple amendments to the pleadings, expert testimony, and extensive documentation. Neither party engaged in misconduct. In terms of costs, the Court of Appeal affirmed the trial judge's decision to apply a multiplier of two to costs that arose after the appellant increased its claim for damages from $2.5 million to $25 million.

39 In *S. (K.) (Litigation representative of) v. Willox*, 2016 ABQB 654 (Alta. Q.B.), the plaintiff had unsuccessfully claimed damages for negligence in an amount "over five times the Column 5 threshold" from the defendant physicians. The litigation was complex, as it involved multiple issues impacting both liability and quantum, multiple experts, five weeks of trial, and written arguments. The plaintiff did not engage in misconduct. Justice Moreau (as she then was) applied a multiplier of two to the Column 5 tariffs to determine the costs award against the plaintiff.

40 In *Klemke Mining Corp. v. Shell Canada Ltd.*, 2007 ABQB 427 (Alta. Q.B.), the plaintiff successfully sued in breach of contract and received $22 million in damages. The Court found that the litigation was lengthy and complex, although not as complex as in *Trizec*, and that no misconduct could be inferred. The Court applied a multiplier of two to the Column 5 tariffs to determine the costs award. The Court then compared that costs award to the plaintiff's total solicitor-client costs to find the percentage of indemnification that the award would provide — 40% — and found that the award provided adequate compensation. Additionally, the Court noted that the solicitor client bill had not been taxed, so the comparative measure (ie of comparing costs determined with the use of a multiplier to a percentage of indemnity) was "less weighty" than if the solicitor client bill had been taxed (para 28).

41 In *Marathon Canada Ltd. v. Enron Canada Corp.*, 2008 ABQB 770 (Alta. Q.B.), the plaintiff succeeded in its claim against Enron for damages of $560,000 and successfully defended Enron's counterclaim for damages of $126 million. The litigation involved numerous complicated pleadings, the exchange of 21 Affidavits of Records, total production that exceeded 15,000 pages, and substantial written arguments. There was no party misconduct. Ultimately, Justice McMahon decided that the "better approach" for determining a costs award was to apply a multiplier to Schedule C fees, rather than applying a percentage of indemnity to reasonable solicitor and own client costs. Justice McMahon applied a multiplier of three to the Column 5 tariffs to determine the costs award based on the following factors in the case: "duration, the sum claimed, the number of experts, the number of documents produced and the complexity of the issues": (para 35).

42 The appellant in *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.) had originally claimed a 1/4 interest in a business with assets valued at $70 million, plus disgorgement of profits for a period of over 30 years. The Court of Queen's Bench dismissed his action and awarded costs to the respondent (*Hill v. Hill*, 2012 ABQB 694 (Alta. Q.B.)). The litigation spanned seven and a half years and involved 38 motions and case management meetings, five appeals or motions filed in the Court of Appeal, the production of over 15,000 pages of documentation, and 23 days of trial. The Court of Appeal noted that the appellant lengthened and delayed the litigation with "ever-evolving claims," wasteful motions, and by making unfounded allegations of misconduct against the respondents (para 14). The Court of Appeal upheld the trial judge's decision to award the respondent costs calculated by applying a multiplier of four to Column 5 tariffs for the period up to the close of the appellant's case at trial. The Court allowed the respondents' cross appeal with regard to the period after the closing of the appellant's case at trial and increased the costs for that period to triple Column 5 costs because of the litigation's complexity and the appellant's "incessant misconduct" (para 52).

43 In *Chernetz v. Eagle Copters Ltd.*, 2003 ABQB 771 (Alta. Q.B.), the plaintiff had sued the defendant helicopter and engine manufacturers after her husband died in a helicopter crash. The plaintiff successfully applied for the production of records over which the defendants had previously asserted privilege. The Court awarded the plaintiff her single Column 5 costs plus reasonable disbursements for the application. Notably, the Court awarded costs to the plaintiff despite there being no evidence that the defendants had asserted privilege in bad faith. As noted by the Court: "[b]ecause of [the] reliance upon full and proper disclosure, a litigant must be particularly diligent in record production and in claims to privilege" (para 7). Further, "[t]o put it briefly, he who claims privilege had best be right if he wishes costs" (para 12).

iv. Hybrid or Alternative Approaches to Costs

44 The defendant in *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2009 ABCA 20 (Alta. C.A.), unsuccessfully appealed a judgment in favour of the plaintiff for $50,000 damages for interfering wrongly with economic relations and inducing breach of contract. The Court of Appeal found that the defendant had engaged in misconduct by improperly refusing to produce material records and that the defendant's employee and witness had lied under oath. Therefore, the Court ordered that costs be awarded on a full indemnity basis from the first day of trial onwards, and on a party and party basis for all expenses incurred before trial.

45 In *Kent v. Martin*, 2017 ABQB 27 (Alta. Q.B.), var'd 2018 ABCA 202 (Alta. C.A.), Justice Strekaf (as she then was) considered the appropriateness of a costs award for a partially successful plaintiff who had originally sought $10.5 million in damages in his defamation actions. The litigation was moderately complex and it extended over eight years. The litigation was also highly contentious and both parties contributed to delays and unnecessary expenses associated with a five week trial and 39 pre-trial court appearances and applications. The defendants engaged in misconduct that included the "intentional strategic

decision to conceal that they were advancing a claim for journalist-source privilege" (para 36). Justice Strekaf awarded $250,000 in costs to the plaintiff based on Schedule C, Column 3 fees, "adjusted upwards to reflect the results and complexity of the proceedings" (para 76).

46 On appeal, the Court of Appeal awarded the plaintiff an additional $200,000 in costs to account for the "seriousness of the [defendants' misconduct] and the need to discourage it" (para 42). The Court found that the defendants' failure to produce highly relevant emails, made worse by altering the emails before producing them, "represented a fundamental breach of the defendants' obligations" (para 33).

B. Courts May Apportion Costs Based on Party Involvement

47 In *Angle v. LaPierre*, 2006 ABQB 380 (Alta. Q.B.), multiple plaintiffs succeeded in their defamation actions against multiple defendants, and the Court attributed costs amongst the defendants. The Court determined that this differential attribution was necessary because the plaintiffs achieved varied degrees of success in their claims. Each defendant was liable for paying Schedule C costs according to the percentage of total trial time attributed to the proceedings against each defendant. The Court stated that this approach fit with the "notion that costs reflect effort" (para 38).

48 In *HSBC Bank Canada v. Lourenco*, 2012 ABQB 648 (Alta. Q.B.), Justice Goss considered costs after finding two defendants liable for knowingly assisting and directing a company, Triple J, in fraudulent and dishonest breach of trust. Justice Goss found that the plaintiff was entitled to solicitor-client costs according to terms in Triple J's General Security Agreement with the plaintiff. Justice Goss apportioned the costs between the defendants on a 75/25% split because of the defendants' "differing involvement in and for this litigation" (para 70).

49 As noted above, the Court in *LSI Logic* also apportioned costs, awarding the successful corporate defendant 66% of its total costs, and the other defendants 33% of their costs because they had participated in the litigation to a lesser extent.

C. Courts May Allow Disbursements for Legal Counsel from Other Jurisdictions

50 In *Waterous Investments Inc. v. Liberton Holdings Ltd.* (1996), 183 A.R. 229, 1996 CarswellAlta 303 (Alta. Q.B.), the successful plaintiff sought to recover travel disbursements incurred because it used legal counsel in Calgary for a trial in Edmonton. Justice Veit stated that "[t]he test by which the choice of lawyers is to be assessed for costs purposes is whether the choice made by the litigant was reasonable" (para 28). Here, while the litigation did not require any specific expertise, the plaintiff was an Ontario corporation who had always used the same legal representation in Alberta. The plaintiff's business activities in St. Albert were likely to spread across the province, and the outcome of the litigation was likely to impact the plaintiff's business throughout Alberta. Therefore, Justice Veit found that it was reasonable for the plaintiff to use its Calgary lawyers to act on its behalf and that travel costs were recoverable.

51 In *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, 2003 ABCA 125 (Alta. C.A.), the successful respondents sought a costs award that included the recovery of travel and accommodation costs incurred by counsel who had travelled from Edmonton to Calgary to argue the appeal. The Court of Appeal granted the travel and accommodation costs, adding to Justice Veit's analysis from *Waterous Investments* the principle that "[t]he competency of counsel must be viewed with some deference through the eyes of the client. Trust and confidence must surround competence in a healthy and sustainable solicitor-client relationship" (para 16). However, the Court of Appeal also noted that its decision was "influenced by the amount requested," which in this case was only $500 (para 17).

52 The Court in *Petrogas Processing Ltd. v. Westcoast Transmission Co.*, [1990] 4 W.W.R. 461, 1990 CarswellAlta 51 (Alta. Q.B.) awarded costs to the defendant after they successfully defended the plaintiff's contractual claim for $224.6 million. The Court ordered full indemnity of costs because government regulation outside of the parties' control justified doing so and because an agreement between the parties allowed for full indemnification. The Court also awarded the Vancouver-based defendant the transportation and accommodation costs associated with having to meet with its Calgary-based legal counsel in both Calgary and Vancouver during the litigation. On this issue, the Court stated that "[t]he question is whether the expense was reasonable and proper in the light of the circumstances which existed at the time it was incurred" (para 56).

53 In *Caterpillar Tractor*, the Court of Appeal ordered that the unsuccessful respondent pay for a disbursement related to the travel and lodging expenses that the appellant paid to the representative of the appellant's parent company to attend trial. The Court allowed the disbursement because it was reasonable for the appellant, who was a large foreign corporation, to have a representative present to consult with and instruct legal counsel.

D. Conclusion Regarding the Common Approach

54 The general rule is that costs should be awarded on a party and party basis and that, absent misconduct, the amount awarded should approximate 40-50% indemnity of a winning party's actual costs (*Marathon* at para 30; *Trizec* at para 21; *LSI Logic* at para 8). Courts may elevate costs to the upper end of that general range and above where the losing party engages in misconduct, when the litigation is particularly long and complex, and when the amount in dispute is significant (*Trizec* at paras 30-32; *LSI Logic* at paras 8, 10, 16; *Marathon* at paras 35-36; *Stewart* at para 25).

55 Alberta courts have recognized that when Schedule C fees are inadequate, courts may use several different methods for determining appropriate costs, including the application of multipliers to a column, extra lump sums, or some fraction of solicitor-client costs (*Caterpillar Tractor* at para 4; *LSI Logic* at para 7). The ultimate question is "whether the final total [reached] is reasonable or not" (*Caterpillar Tractor* at para 4).

56 As the Court of Appeal recently stated, the "[a]pplication of a multiplier is not unprecedented when the trial is long and complex and the quantum of damages claimed is significantly greater than $1.5 million" (*Stewart Estate* at para 24). In fact, Alberta courts have often determined costs awards by applying multipliers to Schedule C fees where a party has engaged in misconduct, the litigation was long and complex, or the quantum sought in the original action was significant (see e.g. *Stewart Estate* at para 25; *RVB Managements* at para 3-4, 13; *Willox* at para 30; *Klemke* at paras 41-42; *Marathon* at paras 35-36; *Hill (ABCA)* at paras 39, 60-61 *Blaze* at paras 80-81).

57 In some cases, courts have avoided using the percentage of indemnity approach on the basis that doing so would undermine policy objectives such as facilitating access to justice (*Blaze* at para 75), or because solicitor-client costs may include items not relevant to party and party costs (*Marathon* at para 31) and not clearly "reasonable and appropriately incurred to advance the issues in the action" (*Kent (ABQB)* at para 62). However, courts may first apply a multiplier to Schedule C fees, and then check the appropriateness of the resulting award by calculating the percentage of indemnity that the award provides to the successful party (*Klemke* at paras 28, 41-42).

V. Analysis

A. Reduction Based on Apportionment

58 Weatherford provided a case in which the Court apportioned costs amongst unsuccessful parties who were parties to the same costs application. However, this case is different, given that the other defendants in Weatherford's action are not parties to this application and occupy very different roles in the litigation compared to Artemis and Kaechele.

59 I am satisfied that Artemis and Kaechele were required to attend the numerous and lengthy Questioning sessions, since they were facing a claim of $290 million. Counsel for other defendants may have assumed a greater role in the actual questioning of witnesses, but counsel for Artemis and Kaechele were still required to prepare for and attend Questioning in order to prepare their defence to the claim. The same can be said of other steps in the litigation, such as interim applications. While other defendants' counsel may have made their submissions first, and therefore taken up more of the application time, it was still necessary for Artemis' and Kaechele's counsel to prepare for and attend these applications, and often to add to the submissions of other counsel.

60 Accordingly, I conclude that the costs incurred by Artemis and Kaechele ought not to be reduced on the basis that counsel for other defendants may have spent more time asking questions or making submissions. It is not appropriate in this case to reduce costs on the basis that Artemis and Kaechele played a lesser role in parts of the litigation. I suspect that the costs incurred

by the defendants who played a greater role likely reflect that difference. Costs should reflect effort (*Angle* at para 38). Artemis and Kaechele had to vigorously defend themselves from a very significant claim. They ought not to have their costs reduced because other defendants also participated.

B. Use of Foreign Legal Counsel

61 A successful party may recover its reasonable costs associated with using legal counsel from another jurisdiction. Where the decision to use foreign counsel is reasonable in the circumstances, and the amounts claimed in costs are reasonable, the successful party should recover those costs (*Waterous Investments* at para 28; *Petrogas* at para 56; *Refco* at paras 16-17).

62 In this case, Kaechele is a German company that hired a bilingual lawyer from a German-based law firm to understand the procedural and legal aspects of Canadian litigation and to overcome linguistic and cultural barriers. This was a reasonable course of action. Kaechele should therefore recover these additional costs, provided the amounts claimed are reasonable.

63 During the course of the application, counsel for Kaechele confirmed that her firm did not charge any fees for reviewing the file when it was transferred to them. She also confirmed that fees and disbursements charged were incurred in relation to this lawsuit alone and did not include charges for other matters. She offered to provide Weatherford's counsel with back-up documentation in support of this position. Therefore, if Weatherford's counsel has not already acted on this offer, I direct that Weatherford's counsel request, and Kaechele's counsel provide, documentation in relation to the fees and disbursements that are questioned by Weatherford. If, following that review, there are any items in dispute, they are to be referred to the Review Officer for a determination of their reasonableness.

C. Appropriate Cost Awards in this Case

64 This litigation spanned over ten years. All of the parties describe the litigation as complex and contentious, involving the production of over 8,000 records, five contested chambers applications (and appeals of some of them), at least 24 case management conferences, and multiple amended pleadings. The stakes were high, given that Weatherford sought damages of $290 million on a joint and several basis.

65 A key question is whether, and to what extent, Weatherford's actions during the litigation fall within the exceptional circumstances where enhanced costs are justified to sanction a party's scandalous or outrageous conduct (see e.g. *Jackson (1993)* at para 28; *Stagg* at paras 44-46; *Cooper* at paras 12-13; *Walsh* at paras 112-113, 158-161). Where a party's error or mistake arises in good faith, this does not excuse the party of its liability for the opposing party's costs (*Chernetz* at paras 7, 12). A mistake made in good faith, however, may be considered as a factor that limits the extent to which a court will enhance costs (*Stagg* at para 63; *Brown* at para 44).

66 Weatherford asserted privilege over relevant and material records. Weatherford refused to produce those records until years into the litigation, after Artemis and Kaechele applied for production. Whether or not Weatherford asserted privilege in good faith, the assertion was at best an error. As stated by Justice McMahon in *Chernetz*, "he who claims privilege had best be right if he wishes costs" (para 12). Furthermore, the circumstances suggest that Weatherford's refusal to disclose records did not stem solely from a good faith belief that privilege applied. Weatherford is a sophisticated business litigant who appears to have made intentional and strategic decisions to delay the litigation until Weatherford could copy Artemis' and Kaechele's stator products for its own profit (see *Weatherford (2016 ABQB)* at paras 151-153; *Weatherford (2017 ABCA)* at para 36).

67 More importantly, the Withheld Records contained information that resulted in the successful dismissal of the Action on the basis of the *Limitations Act*. Once disclosed, it became clear to Artemis and Kaechele, and ultimately this Court and the Court of Appeal, that the Action was commenced after the expiration of the limitation period, following a conscious decision by Weatherford to delay commencement for business reasons. If it was obvious to Artemis, Kaechele, this Court and the Court of Appeal, it ought to have been clear to Weatherford that this Action could not be maintained against Artemis and Kaechele. But the Action was not discontinued, and Artemis and Kaechele were forced to seek dismissal of the action, and to defend the dismissal decision at the Court of Appeal and the leave application to the Supreme Court, in order to end a very lengthy and complex lawsuit that was commenced after the limitation period had expired.

68 Therefore, I would characterize Weatherford's conduct as misconduct in the sense that Weatherford, either erroneously or improperly, claimed privilege and strategically delayed commencing the Action against Artemis and Kaechele to maximize its own long term benefit. Similarly, I would characterize Weatherford's conduct as misconduct in the sense that it commenced and continued a lawsuit against Artemis and Kaechele when it had in its possession documents which made it clear that it had brought its action out of time. Weatherford's conduct did not involve fraud, a breach of trust, an abuse of process, breached undertakings, ever-evolving claims, or the making of baseless allegations of dishonesty and misconduct. However, there is an aspect of outrageousness, in that Weatherford commenced and continued a complex and expensive lawsuit against two parties when it was in possession of documents that should have alerted it to the fact that its time for doing so had expired. While Weatherford's conduct warrants deterrence, I would not place it on the upper end of the scale of misconduct that justifies an indemnity of costs, but conclude that enhanced costs aimed at deterring such conduct are warranted.

69 Given the duration of the litigation, its complexity, the amount claimed by Weatherford, and the presence of some misconduct, an application of Schedule C, Column 5 fees would be inadequate in this case. Weatherford itself acknowledges this, but disagrees with the magnitude of the enhancement which is warranted in these circumstances. I have concluded that a percentage of its solicitor-client costs is not appropriate, given that the solicitor-client costs have not been taxed and that such a taxation would undoubtedly entail considerable time and additional expense. I have therefore concluded that a multiple of Column 5 taxable costs is the appropriate manner of determining costs in this case.

70 Weatherford's failure to produce the highly relevant material records when it did not have a proper basis to do so resulted in Artemis and Kaechele having to defend a complex and high-risk lawsuit for ten years. I have concluded that for the period from commencement of the lawsuit to the date that the Withheld Records were disclosed, Weatherford ought to pay costs based on Column 5 of Schedule C using a multiplier of 4. From the date of disclosure to the conclusion of this lawsuit, the costs award should be reduced, since, had the Withheld Records been disclosed at the outset, the dismissal application and appeal would likely have been required in any event. From the date the Withheld Records were produced to Artemis and Kaechele, Weatherford shall pay costs based on Column 5 of Schedule C using a multiplier of 2 1/2.

71 As I mentioned earlier, at the hearing of the application there was some concern regarding the inclusion of certain entries on the proposed Bills of Costs produced by Artemis and Kaechele. Weatherford is to identify any remaining items that it disputes, and if the parties are unable to agree on a resolution in respect of those items within 60 days of receiving Weatherford's updated list of disputed items, the items shall be referred to the Review Officer for a determination. If any decisions required in respect of disputed items fall outside of the jurisdiction of the Review Officer, the parties may bring those matters before me for further determination. Should that become necessary, the parties are directed to contact my assistant for the purposes of arranging a time at which any disputed items may be addressed further.

Application granted.

TAB – 11

ocx

2013 ABCA 313
Alberta Court of Appeal

Hill v. Hill

2013 CarswellAlta 1785, 2013 ABCA 313, [2013] A.W.L.D. 5176, [2013] A.W.L.D. 5177, [2013] A.W.L.D. 5179, [2013] A.W.L.D. 5180, [2013] A.W.L.D. 5181, [2013] A.J. No. 1016, 234 A.C.W.S. (3d) 868, 3 Alta. L.R. (6th) 302, 561 A.R. 50, 594 W.A.C. 50

Daniel Walter Hill, Appellant/Cross-Respondent (Plaintiff) and Paul James Hill, Richard P. Rendek, Rand Flynn, Famhill Investments Limited and Harvard Developments Inc., Respondents/Cross-Appellants (Defendants)

Jean Côté, Peter Costigan JJ.A., Elizabeth Hughes J. (ad hoc)

Heard: September 11, 2013
Judgment: September 27, 2013
Docket: Calgary Appeal 1201-0333-AC

Proceedings: reversing in part *Hill v. Hill* (2012), 2012 ABQB 694, 2012 CarswellAlta 2045, (sub nom. *Hill v. Hill Family Trust)* 543 A.R. 1 (Alta. Q.B.); additional reasons to *Hill v. Hill* (2012), 2012 ABQB 256, (sub nom. *Hill v. Hill Family Trust)* 540 A.R. 158, 2012 CarswellAlta 873 (Alta. Q.B.)

Counsel: C.J. Popowich, K. Reiffenstein for Appellant / Cross-Respondent, Daniel Walter Hill
M.O. Laprairie, Q.C., J.R. Wildeman for Respondents / Cross-Appellants, Paul James Hill, Richard P. Rendek and Rand Flynn
F.R. Foran, Q.C., J.G. Hopkins for Respondents / Cross-Appellants, Famhill Investments Limited and Harvard Developments Inc.

Subject: Civil Practice and Procedure; Estates and Trusts

APPEAL by plaintiff from judgment reported at *Hill v. Hill* (2012), 2012 ABQB 694, 2012 CarswellAlta 2045, (sub nom. *Hill v. Hill Family Trust)* 543 A.R. 1 (Alta. Q.B.) concerning costs in litigation involving trust; CROSS-APPEAL by defendants.

***Per curiam*:**

A. Introduction

1 This is an appeal and a cross-appeal from a costs decision given after a long trial. The trial judge's decision on the merits is 2012 ABQB 256 (Alta. Q.B.), and his decision on costs is 2012 ABQB 694 (Alta. Q.B.). They set out the facts in great detail, but these brief details will introduce the basic situation, and state a few facts in general terms.

2 The appellant's late father built up a very successful valuable set of businesses. Ownership depended upon a discretionary trust made long ago, partly for tax reasons. The appellant (who later became legally trained) had little to do with the business. His brother did, and ultimately the trustees appointed him as beneficiary. The appellant formed the fixed belief that years before, four of the children had been appointed, and so the appellant (as one of them) had a 1/4 interest in the business. The trial judge found that that was not so.

3 The appellant was the plaintiff, and his statement of claim raised many other causes of action and allegations. It also sought disgorgement of profits on a host of grounds. The appellant alleged that almost everyone on the other side had been guilty of a variety of types and instances of fraud, dishonesty, and other misconduct.

4 The trial judge gave two separate sets of costs, one to the corporate defendants and one to the individual defendants. They had been separately represented for some years before the trial. They are the respondents.

5 The judge gave the respondent defendants costs calculated on 4 times column 5 of Schedule C up to the close of the appellant plaintiff's case at trial, and on single column 5 thereafter.

6 The appellant plaintiff has appealed costs (separately from his unsuccessful appeal on the merits of the lawsuit). The respondent defendants cross-appeal the restriction of costs to single column 5 for the last part of the trial.

7 There is an outstanding motion to fix certain aspects of the costs of the main appeal, but we have been asked not to decide that until this trial costs appeal is decided.

8 We will discuss the main appeal first, then the cross-appeal.

B. Exceeding Column Five

9 On the main appeal, the appellant first objects to any fees which exceed single column 5 of Schedule C.

10 His ground for this first objection alleges that some of the matters which the trial judge considered are entirely irrelevant to costs.

11 The first matter said to be irrelevant is how much the winning parties' legal fees were. But party-party costs are not plucked out of the ether; they are designed to be somewhere around half a reasonable legal bill, or a little under. And Schedule C does not bind a judge in any respect, and is not even presumed correct. See R 10.31(3)(a) and Part D below. So actual legal bills are relevant. That the actual bills might be too high goes to weight, not to relevance. And the appellant never argued that the respondents' legal bills were too high, says the trial judge. The respondents say that the appellant did not object to looking at these bills at any time in the Court of Queen's Bench. And the amount of actual legal bills is only one of many factors. This factor is a useful cross-check: *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, 1998 ABCA 118, 216 A.R. 304, [1998] 10 W.W.R. 736 (Alta. C.A.) (paras 8, 9).

12 The second objection in the appellant's list is not really relevance. It is that someone else paid some of the legal bills. But the legal test to recover party-party costs is not what has been paid; it is whether the party was liable to pay his lawyer. The respondents were liable. Payment of fees by an insurer, relative, or friend is not a bar to recovering costs: *Jacobi v. Newell (County No. 4)* (1994), 153 A.R. 241 (Alta. Q.B.), 246-47 (paras 17-24); *Armand v. Carr*, [1927] S.C.R. 348, [1927] 2 D.L.R. 720 (S.C.C.).

13 In any event, this question is academic here. No one else paid the legal bills; there was simply an unequal distribution from a purely discretionary trust. Nor was this objection ever made to the trial judge. The appellant's suggestion that his father used money that had been held back for this suit is not founded in the evidence.

14 The third factor to whose relevance the appellant objects is that the appellant had brought many wasteful motions. This cannot be irrelevant, in light of R 10.33, paras (1)(d), (f) and (2)(a), (d). The appellant and his ever-evolving claims were moving targets throughout, and he was so ingenious, persistent, technical and unpredictable, that the respondents needed the utmost care. That topic of prolonged interlocutory warfare cannot possibly be irrelevant. Rule 10.33(2)(a) expressly makes relevant unnecessary conduct or conduct lengthening or delaying the action or steps in it. There was a plethora of that. As for the size of the evidence, the number of witnesses is not the only measure. Five hundred and ninety records, totalling over 6500 pages, were marked as exhibits.

15 The appellant now suggests that looking at the numerous motions in the suit is double counting. But it is not; the trial judge considered the motions from the point of view of complexity. This lawsuit was complex from any point of view. The trial judge was entitled to take notice of the contents of the court file, and did not need evidence of such motions made before he performed duties in this suit.

16 The fourth irrelevant factor which the appellant suggests the trial judge relied on was the previous similar lawsuits. That situation is rare in ordinary litigation. It adds complexity, adds volume to the relevant paperwork, and adds issues of *res judicata*; so we have trouble in seeing that that is irrelevant to costs. In any event, the trial judge expressly did *not* weigh this independently (para 19). He merely mentioned it in his preliminary survey of the background (para 16). So this is academic too.

17 The fifth irrelevant factor allegedly relied on was the appellant's unshakeable belief in a valid trust in his favor. But the trial judge's point was not the appellant's motivation; it was his extraordinary persistence, and continual searching for new reasons to reach the same old conclusion. The courts' experience with many indefatigable litigants shows how much that multiplies litigation expenses for opponents. Whatever the appellant's actual motivation or beliefs, his conduct had a certain manner. A reasonable bystander (or opponent) would have concluded that as a result, caution and sufficient resources were called for. See the trial judge's Reasons on costs, para 17, and note the past tense at the end. The test was not subjective.

18 The appellant also complains that two parts of the trial got a different costs scale (some column 5, some four times that). But that is the obverse side of the cross-appeal. We will discuss that below, under Part D.

19 The sixth factor which the appellant calls irrelevant was accusing the respondents of serious impropriety, with little or no evidence to support those accusations. The appellant's pleadings and arguments at every step were studded with examples of that. One could cite a dozen modern Alberta cases (some in the Court of Appeal) increasing costs for that reason. See also the *Caterpillar* case, *supra*, at para 12. Recent high authority is *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303, 316 N.R. 265 (S.C.C.) (para 26). We are aware of no Canadian authority questioning the relevance of that factor. Indeed it is mandated by R 10.33(2)(a), (d), (e). The fact that the appellant withdrew many of these allegations halfway through trial is a repeat of the issues on the cross-appeal. Again, see Part D for a discussion.

20 There is no validity to any of the first ground of appeal. And even if one were to ignore the standard of review, single column 5 would have been patently insufficient. That is explained in Part D below.

C. Separate Sets of Costs

21 The respondents say that this objection by the appellant is new in the Court of Appeal, and was not made in the Court of Queen's Bench, as was pointed out there to the trial judge. The topic is not discussed in the trial judge's reserved written costs Reasons.

22 The appellant now argues that the two groups of defendants, separately represented, should share a single set of costs. This overlaps with the earlier appeal on the merits, which we decided. There the appellant argued that for the same reasons, the Court of Appeal should not hear separate counsel. The Court of Appeal rejected that argument.

23 One test may be "whether a party unnecessarily separated that party's defence from that of another party": R 10.33(2)(c).

24 Obviously there is some overlap in the various defendants' interests, but the issue is slightly different: whether separate counsel or defences were necessary, or reasonably appeared to be needed. The test is not how the suit turned out; it is what was possible a long time before trial: *Lamport v. Thompson*, *infra*. If the identity of the various parties' interests and positions did not apply all across the board, then obviously separate counsel were needed. The central and original contest was over who in effect owned one of the companies. How could the individuals who were the rival owners have identical positions to the companies owned? The companies were accused of oppression and of knowing breaches of trust because of matters of which the companies and their officers had no personal knowledge, and did not believe had happened. Knowledge is relevant, so the companies had a defence not open to the family members.

25 The fact that the appellant kept alleging misconduct by certain parties, and changing his grounds of suit, made separate counsel even more important.

26 In any event, a party accused of individual bad and dishonest conduct such as fraud, is entitled to his or her own counsel: *Keystone Shingles & Lumber Ltd. v. Royal Plate Glass & General Insurance Co.* (1955), 15 W.W.R. 283 (B.C. S.C.), 285;

Valley Salvage Ltd. v. Molson Brewery British Columbia Ltd., [1976] 3 W.W.R. 673 (B.C. S.C.); *Lamport v. Thompson*, [1942] 2 D.L.R. 65 (Ont. C.A.), 69.

27 The appellant kept adding to his list of alleged instances and types of misconduct. The allegations were usually against one or two individuals, and usually not all parties were alleged guilty of a single accusation. That alone shows diversity of interest. Nor were the respondent defendants obliged to laugh off the allegations in this suit by a persistent litigant involving both huge sums of money, and the reputations of many, including a lawyer and a chartered accountant.

28 There is some resemblance to the separate-costs awards in *599291 Alberta Ltd. v. Luff*, 2008 ABCA 57, 429 A.R. 215 (Alta. C.A.).

29 The appellant alone had three trial counsel.

30 No unnecessary duplication of work is alleged between the two sets of counsel for the respondent defendants. Obviously the trial judge thought there was no significant unnecessary duplication. The only example of the respondents' allegedly unnecessary duplication mentioned in the appellant's factum on costs is some portions of their statements of defence. The same factum mentions adoption of certain arguments of the co-defendants. That is the opposite of duplication of work.

31 The Court should be slow to second-guess counsel's decision as to when interests conflict: *Kurian v. Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2004 ABCA 217 (Alta. C.A.), Edm. 0203-0078-AC, [2004] AUD 2039 (June 28, with corrigenda) (para 10).

32 This second ground of appeal must fail.

D. Cross-Appeal as to Scale of Costs for Latter Part of Trial

33 The respondents cross-appeal. The trial judge gave them quadruple column 5 only up to the close of the appellant plaintiff's case. The respondents say that they should not have been restricted to single column 5 after the close of the appellant's case. That reduction extends over 29 half-days of oral proceedings, which is much longer than most whole trials. The judge said that he lowered the scale of costs after that point for one reason only: because the appellant then dropped one of his claims (after some cajoling). The parties could not know then that the trial judge would dismiss the entire suit.

34 However, the appellant dropped no factual allegations; the allegations all remained as the foundation for other causes of action. The only change was that the facts were no longer said to lead to oppression. For example, the head of the company was still accused of breach of trust, and the company still accused of knowing assistance, in respect of the same transactions which had been the foundation for the oppression claims dropped at the end of the plaintiff's case. Claims to repay salary were dropped against the company's head, but not claims to reimburse 22 transactions in that office. And at the same time as oppression was withdrawn, read-ins about the other transactions were entered as exhibits. The respondents led evidence to rebut that, and were cross-examined on that by the appellant.

35 Only once during the case of the respondent defendants did the appellant object to an item of their evidence on grounds of irrelevance. The appellant's challenge to the 1995 conveyance which gave the head of the company his ownership was *not* withdrawn at the close of the plaintiff's case; it persisted until final oral argument.

36 That the appellant plaintiff called only two live witnesses may sound relevant, but it leaves a mistaken impression, because most of the evidence went in by admissions, read-ins, and cross-examination. Indeed, since much of the evidence was never given out loud, length of oral proceedings is misleading.

37 The pleas of misconduct were never formally withdrawn by amendment, discontinuance, or otherwise. The respondents (appellants by cross-appeal) and the trial judge both point that out. The closing argument of the appellant at trial repeated an allegation of dishonesty, and more surfaced on appeal.

38 We must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it, as he or she sees fit. See *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*, *supra* (paras 6, 8), and R 10.31(3)(a).

39 One must note the huge sums of money in issue: capital of one quarter of $70,000,000 assets (according to trial evidence), plus disgorgement of profits or income for over 30 years. So the amounts in issue were far higher than column 5 involves. That column is for suits over $1.5 million. Alberta courts routinely multiply it several fold.

40 On top of that, Schedule C's amounts did not change with the new Rules. It was drafted by an *ad hoc* committee about 16 years ago.

41 One might wonder whether the standard of review on appeal bars the Court of Appeal from interfering with this reduction of column. There were some palpable factual and legal errors by the trial judge on this point. We itemize some below.

42 One error is simple. The trial judge calculated the period of lower costs during the respondents' case as including five one-half days of oral argument. But that argument covered the appellant plaintiff's case too; it included his evidence which was all given before he withdrew any allegation. The trial judge overlooked that point, and his Reasons do not contain anything which would justify reducing the costs for that step. Costs for those five half days must be put back up to quadruple column 5.

43 As for the other 22 days of trial and after the plaintiff's case closed, it is true that the trial judge had some discretion, and that the Court of Appeal owes him deference. He reduced costs for one sole unusual and very discrete reason, which he described. The entire discussion is in para 29 of his Reasons:

> I agree with the plaintiff that regard must be had to the fact that even a late narrowing of the issues, thereby reducing the length of a trial should be encouraged. Awarding enhanced costs for trial time thereafter would serve to discourage counsel from continuously reassessing their case during a trial. Counsel fairly observes that awarding enhanced costs in such a circumstance would mean there is no incentive for litigants to have regard to the principles enunciated in Rule 1.2.

44 The trial judge cannot have meant that there would have been no incentive if any costs were above Schedule C after a claim was withdrawn. That would make no sense. The trial judge must have meant that the same full multiple of Schedule C after the withdrawal as before, would offer no incentive.

45 But reducing the last part of the trial from 4 times column 5 to single column 5 is a 75% discount in the fee part of costs, estimated to be $400,000. Even after putting argument costs back up to quadruple (about 1/6 of that) it will still be a huge discount off quadruple column 5. No one suggests that this particular incentive to drop claims should or could have any effect on costs before claims are dropped. (To do that would produce backwards incentives.)

46 The trial judge's discretion to give some reduction after withdrawing a claim as an incentive, should be respected on appeal. But can a 3/4 (or 2/3) reduction be justified? (It is about 2/3 after putting argument back to 4 times column 5.) Is the reduction proportional to the size of incentive necessary? The Reasons do not reveal that the trial judge considered this aspect, let alone calculated it.

47 Four aspects of holding fees to single column 5 for the respondent defendants' part of the trial are disturbing.

48 First, the appellant (respondent by cross-appeal) does not point to any evidence which the respondent defendants led at trial which they should not have, or was unnecessary. (Only one bit was objected to at trial as irrelevant.)

49 Even more striking, the trial judge's Reasons on the merits show that the respondent defendants won the trial largely because of witnesses whom they called. A striking example is that of the surviving tax lawyer involved in the supposed 1976 appointment of beneficiaries. And some of the respondent defendants testified on those topics. Indeed another of the respondents' witnesses not only gave important eyewitness evidence, but prepared spreadsheets which the trial judge found "particularly useful".

50 The second aspect is amount in issue. We have noted above the reasons why single column 5 would be clearly inadequate for any suit over assets and income of this size, even if it ran smoothly and without misconduct, and were not of unusual complexity.

51 That factor got no weight whatever, as the trial judge put costs down to single column 5 (at the end of the trial) without any misconduct by the respondent defendants, nor any divided success.

52 Third, we have noted above the undoubted incessant misconduct by the appellant plaintiff: a host of grave but unfounded allegations of misconduct. Similarly that got no weight at all during the second part of the trial when the defendants defended themselves against those allegations. That is baffling.

53 Fourth, the trial judge noted the great complexity of the suit. Similarly it got no weight at all for the second part of the trial.

54 For over 70 years, Courts of Appeal have had and used the power to interfere with discretionary decisions (such as costs) where improper weights are given (or not given) to irrelevant (or relevant) factors.

55 The seminal case is *Evans v. Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646 (U.K. H.L.). The power of an appeal court to interfere was held to cover a case where not nearly enough weight had been given to an important factor, in *Charles Osenton & Co. v. Johnston* (1941), [1942] A.C. 130, [1941] 2 All E.R. 245 (U.K. H.L.), 250, 253, 256, 261. That was approved in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 132 N.R. 321, [1992] 2 W.W.R. 193 (S.C.C.), 246-47 (paras 104-05). It overturned a discretionary decision on grounds that it had given insufficient weight to an important question: p 249 (WWR (para 108)). See also *Dufault v. Stevens* (1978), 86 D.L.R. (3d) 671 (B.C. C.A.), 678, and *Campbell v. Campbell* (1955), 14 W.W.R. 690 (B.C. C.A.).

56 A discretionary costs order was upset on appeal for giving no weight to two important factors, in *Apotex Inc. v. Canada (Minister of National Health & Welfare)* (2000), 194 D.L.R. (4th) 483, 265 N.R. 90 (Fed. C.A.), 94-95.

57 One must be careful; that is not a license to reweigh afresh on appeal every weight given by a trial judge to every factor. The precise limits of the power to upset on grounds of weight need not be settled here.

58 But when a factor to weigh is clearly relevant, clearly exists, is clearly important, and gets no weight whatever (has no effect on the result), then the Court of Appeal should look closely at the matter. Here the trial judge's Reasons clearly show that four undoubted and important factors got no weight at all. That allows us to intervene.

59 If the disputed part of the costs were a few thousand dollars, or a few per cent, probably we would not tinker. But where it is well over $300,000 and is 65 to 75% of the fees for half the trial, we must intervene.

60 We increase the fee costs for the latter part of the trial where the defendants led evidence, from single column 5 to treble column 5. (That includes any trial time consumed by rebuttal evidence by the appellant.) That leaves a drop in scale from quadruple to treble (i.e. a discount of single column 5) to respect the trial judge's decision to give an incentive for withdrawing claims, and to respect his choice of the type of incentive to give.

E. Conclusion

61 The appeal is dismissed, the cross-appeal allowed, costs for the five half days of argument are restored to quadruple column 5, and the column of Schedule C after the close of the plaintiff's case is increased to 3 times column 5.

62 We award each set of respondents costs of this costs appeal fixed at $68,000, plus disbursements fixed at $600.

Appeal dismissed; cross-appeal allowed.

End of Document

TAB – 12

2014 ABQB 105
Alberta Court of Queen's Bench

FIC Real Estate Fund Ltd. v. Lennie

2014 CarswellAlta 278, 2014 ABQB 105, [2014] A.W.L.D. 1748, [2014] A.W.L.D. 1803, [2014] A.W.L.D. 1804, [2014] A.J. No. 184, 114 W.C.B. (2d) 27, 241 A.C.W.S. (3d) 322, 585 A.R. 290

FIC Real Estate Fund Ltd., Plaintiff and Malcolm Lennie, 1316576 Ltd. and Kenneth Horne, Defendants

Robert A. Graesser J.

Heard: December 17, 2013
Judgment: February 14, 2014
Docket: Edmonton 1003-03313

Counsel: Kenneth W. Fitz, for Plaintiff
Greg Lintz, for Defendants

Subject: Civil Practice and Procedure; Contracts; Property; Public; Torts

APPLICATION by real estate company to find respondent business owner in contempt of court, and to recover costs accordingly.

***Robert A. Graesser J.*:**

Introduction

1 This is an application by the plaintiff, FIC Real Estate Fund Ltd., for a declaration that the defendant Kenneth Horne is in contempt of court, and for an award of costs against him in relation to his alleged contempt.

2 Mr. Horne denies that he is in contempt of court, and argues that costs of the proceedings against him should be in the cause, and not determined now at a very early pre-production and pre-questioning stage of the proceedings.

Facts

3 There is a lengthy history among these parties. Mr. Lennie and Mr. Horne are long-time friends. Mr. Lennie, an Edmonton lawyer, represented Mr. Horne in various real estate transactions. He also acted as solicitor for FIC in some transactions. At some stage in their dealings, Mr. Horne, Mr. Lennie and FIC participated in a real estate venture that involved the purchase for development of a piece of property owned by Mr. Horne. One of the development entities was the defendant 1316576 Alberta Ltd., a company owned by Mr. Lennie and Mr. Horne.

4 Ultimately, that deal did not close because FIC allegedly did not make the final payment owed to 1316576 Alberta Ltd.

5 When 1316576, Mr. Lennie and Mr. Horne treated the payments made by FIC as forfeited because of FIC's default, FIC commenced action against Mr. Lennie, Mr. Horne and 1316576 and filed a caveat against the lands.

6 For some yet unexplained reason, Earle Pasquill, the principal of FIC, discharged the caveat in the spring of 2013 notwithstanding that the litigation involving FIC and the defendants and the land had not been resolved. That left the property unencumbered, and Mr. Lennie and Mr. Horne were able to complete a pending sale without having to deal further with Mr. Pasquill, FIC or the caveat. The discharge of caveat was done directly by Mr. Pasquill and FIC, and did not involve FIC's lawyers.

7 When FIC learned that the monies resulting from the sale of the land had been paid out and were not being held in relation to the litigation, it applied *ex parte* on May 15, 2013 before Lee J. for an order requiring that Mr. Lennie and Mr. Horne immediately pay the funds they had received for the sale of the lands into court.

8 The order was brief and clear:

1. An order that all amounts received by the Defendant, Kenneth Horne ("Horne"), in respect of the sale of the Horne Lands (as defined herein) being the amount of $1,000,000.00 be paid into Court and held to the credit of this action until further order of this Court.

2. An order that all amounts received by the Defendant, 1316576 Alberta Ltd. ("131"), in respect of the sale of the 131 Lands (as defined herein) being the amount of $1,615,000.00 be paid into Court and held to the credit of this action until further order of this Court.

3. An order directing the Applicant to provide copies of this application and the supporting material and to serve the order arising out of this application on counsel for the Defendants, forthwith.

4. An order directing that the Defendants may, on 48 hours' notice to counsel for the Plaintiff, bring an application to seek to set aside or vary all or part of the order granted *ex parte*.

5. There are no costs arising from this application.

9 That order was served on counsel of record for both Mr. Lennie and Mr. Horne (not counsel on this application) on May 15 via email and fax. That lawyer had filed a statement of defence on behalf of all defendants in the action. No issue is taken with the manner of service of the order on the defendants' lawyer of record. FIC was entitled to serve the order on the defendants' counsel and to be able to rely on the effectiveness of that service.

10 As a belt and suspenders approach, a copy of the order was also served on the lawyer of record by courier on May 16, 2013, and Mr. Lennie was served personally on May 16, 2013. All of these services are documented in affidavits of service and these have been filed in the action.

11 On May 27, counsel for the defendants filed an application to set aside the May 15 order, serving a notice of application on counsel for FIC. The application is clear that it seeks relief for all of the defendants, as all defendants were affected by the May 15 order.

12 The affidavit of Malcolm Lennie dated May 22, 2013 was filed in support of the application. The application to set aside the order was heard on May 30 by Ross J. She refused to set aside or vary the May 15 order and instead adjourned the application *sine die* pending cross-examination of Mr. Pasquill.

13 She expressly ordered that "the defendants are required to comply with the terms of the May 15th Order". She also provided a mechanism for security to be paid by FIC for any monies paid into court by any of the defendants.

14 The order from the May 30 application before Ross J. was approved by counsel for the defendants, and was filed on June 25.

15 The application to set aside the May 15 order is, as at the date of this decision, still pending. Mr. Pasquill was cross-examined in the summer of 2013 but no further steps have been taken relating to the application.

16 The parties first appeared before me on July 3, 2013 on FIC's application to enforce the terms of the May 15th order against Mr. Horne. As at that time, Mr. Horne had not complied with any aspect of it. Mr. Lennie had by then provided the statutory declaration required of him by the terms of the May 15th order and Justice Ross's May 30 order. The statutory declaration indicated that the monies Mr. Lennie received in respect of the sale had been transferred to 1746437 Alberta Ltd., a company

owned by Mr. Lennie, and members of his immediate family. That led to the amendment of the statement of claim to include 1746437 Alberta Ltd. as a defendant.

17 Mr. Lennie's statutory declaration and records provided with it gave some information as to what had happened to the sale proceeds to Mr. Horne, and through this disclosure, FIC learned that substantial funds had been paid to Mr. Horne and deposited in Mr. Horne's account at Servus Credit Union in Sherwood Park.

18 On the July 3 application, counsel for the defendants advised me that he had not been in contact with Mr. Horne, and that attempts to send materials to Mr. Horne's last known address had been unsuccessful. That was not surprising, as the last known address was the property that had been sold after the caveat was discharged. He advised that he had no instructions from Mr. Horne and that he was ceasing to act. He took no further role in the application on July 3.

19 I granted an order in favour of FIC freezing Mr. Horne's accounts with Servus Credit Union and requiring Servus to provide bank statements for any of Mr. Horne's accounts starting April 1, 2013 as well as copies of any documents evidencing the disbursement of funds from these accounts.

20 The May 15 order had been served on Mr. Horne through his lawyer of record, and Mr. Horne, through his counsel, had made an application to set aside the May 15 order. His counsel was present when Justice Ross denied the application at that stage, adjourned the application and directed that the defendants (including Mr. Horne) comply with the May 15 order. As at July 3, Mr. Horne had taken no steps to comply with the May 15 order. I accordingly issued a warrant directing that he be taken into custody and brought before the court to show cause why he should not be held in contempt.

21 The warrant was not enforced, as Mr. Horne learned of it and voluntarily came forward on July 10, 2013 to deal with the matter.

22 There have been a number of applications or appearances before me since July 10 as to Mr. Horne's compliance with the May 15 order. These appearances relate only to Mr. Horne and not the other defendants.

23 Since that time, Mr. Horne has been working through his new counsel to comply with the terms of the May 15 order. As at the last appearance on December 17, 2013, Mr. Horne has accounted for the funds received. Some monies have been paid into court, some monies are frozen in accounts, and security has been given by some third parties involved. Some portion of the funds has not yet been paid into court as a result of the involvement of another third party. Other proceedings are contemplated by FIC involving that third party.

24 I am satisfied that at this stage, Mr. Horne has done what is reasonably within his power to do to comply with the May 15 order, short of using other funds or resources to pay money into court.

25 Since July 3, FIC has been seeking a declaration that Mr. Horne is in contempt of the May 15 order and the May 30 order, and for an order granting it solicitor and client costs of the proceedings they have taken to enforce the May 15 order. I have continued to adjourn the issues of contempt and costs to allow Mr. Horne an opportunity to comply with the orders and purge any contempt (if indeed he has been in contempt of court).

26 As at December 17, it was clear that the time was appropriate to determine these issues.

Positions of Parties

FIC

27 FIC's position is simple. It obtained an order from Justice Lee on May 15, requiring that certain things be done. That order was served on Mr. Horne in the manner contemplated by the *Rules of Court*, namely on his lawyer of record. Having been properly served, Mr. Horne failed to comply with the May 15 order, in that he did not pay any monies into court and he did not file the required statutory declaration. Through his counsel he applied to set aside the May 15 order, and although he was not personally present in court on May 30 when Ross J. heard the application, his lawyer was there. Subsequently, he failed to

comply with either the May 15 order or Justice Ross's direction that it be complied with. Instead, the day after Justice Ross's order, he transferred money out of the province and to third parties. His failure to comply with the order is a contempt of court.

28 Trying to get compliance with the orders, and securing funds disbursed by Mr. Horne following the orders, has been very expensive for FIC, and they should not be out of pocket. Thus a declaration of contempt and an award of solicitor client costs are appropriate. Because none of the enforcement issues is attributable to anything done by the plaintiff, costs should be on a solicitor and his own client basis, not just solicitor and client. These costs are currently in excess of $50,000.

29 Counsel argues that FIC should be able to recover these costs immediately from funds paid into court, and that Mr. Horne should be required to replace those funds forthwith.

Mr. Horne

30 Mr. Horne acknowledges that he was represented by counsel, but in his statutory declaration dated July 22, 2013, says that he only learned of the May 15 order on July 4. He explained that the litigation was essentially dormant between the summer of 2012 and the summer of 2013, and he was not in contact with counsel. He was not aware of the May 15 order, nor was he aware that an application was being made to set it aside. He did not give counsel instructions to make that application, and was unaware of it being made, or of the result of the application until on or after July 4.

31 He points to the underlying cause of these proceedings: that Mr. Pasquill discharged the caveat and is now trying to undo the effects of that. He denies transferring any funds in knowing contravention of any court orders. He says that he has since learning of the May 15 and May 30 orders done everything in his power to comply. Any shortcomings in compliance are because he cannot control third parties who now have some involvement in the matter, having received some of the funds.

32 He says that the plaintiff's claim is by no means certain to succeed, and argues that any costs (other than costs I have directed to be paid along the way) should be dealt with at the end of the matter. Alternatively, he disagrees that costs should be on a solicitor and client or solicitor and own client basis.

33 As for contempt, Mr. Horne denies that he is in contempt of any order, as he did not have personal knowledge of the May 15 or May 30 orders until July 4. Everything complained of by FIC occurred in the interval between April 23 (when he received funds) and May 31 when the funds were largely disbursed. Personal knowledge is an essential element in contempt proceedings, and he did not have personal knowledge.

34 While his lawyer may have known of the orders, that knowledge was not communicated to him and for the purposes of a contempt application should not be attributed to him.

Analysis

Personal Knowledge

35 This case illustrates the difficulties commonly encountered when there is a dispute as to whether a client has actual knowledge of something served on his or her lawyer of record. Communications between solicitor and client are protected by privilege, so it is frequently difficult to verify a client's claim that he did or did not have any particular communication with his or her lawyer.

36 It also illustrates the challenge for lawyers whose clients are difficult to contact, and for clients whose lawyers do not communicate with them on a regular or frequent basis.

37 Nevertheless, the *Rules of Court* are clear as to service of documents on the party's lawyer of record. That has been the case for at least 100 years in Alberta, and has innumerable benefits: ease, effectiveness and cost being the most obvious. It places the burden on the opposing lawyer to ensure that the other party's lawyer is fully informed of all steps, and places the burden on counsel to keep his or her client informed.

38 A lawyer who takes a step of some sort is presumed to do so with the knowledge and instructions of his or her client. That is something which cannot normally be tested having regard to solicitor and client privilege.

39 Effective communication between a solicitor and his or her client is a matter for the Law Society to deal with, and certainly not opposing counsel and the courts.

40 I have Mr. Horne's sworn evidence that he was not aware of the May 15 or May 30 orders until July 4. Inferentially, if his evidence is to be accepted, he cannot have known about these orders when he transferred money out of Alberta or to third parties. And he cannot have made a conscious decision to ignore the requirement to pay money into court or provide a statutory declaration when he did not know he was obliged to do so.

41 He was not questioned on his communications with his solicitor or with Mr. Lennie between April 23 and July 4. I am thus left with no evidence to the contrary.

42 His statutory declaration evidence is similar to what I was told in court on July 3, namely that his lawyer had not had any communications with Mr. Horne for some time and was not sure how to contact him.

43 It may well be that until that time, Mr. Horne was content to have Mr. Lennie, his long-time friend and lawyer, deal with their joint lawyer. And their lawyer may have been content to take instructions from both of them (and the company) through Mr. Lennie. But that does not absolve the lawyer from keeping all clients informed, especially where the client is required by court order to do something forthwith.

44 In any event, most of these issues are between Mr. Horne and his former lawyer in the matter.

45 Nevertheless, I am satisfied on the evidence before me that Mr. Horne did not have personal knowledge of the May 15 order until July 4. Inferentially, he did not know about Justice Ross's May 30 order until July 4 or later.

Service

46 An order is not a commencement document as defined in the *Rules of Court*, nor is a notice of application, so it may be served in a number of different ways on the lawyer of record.

47 "Lawyer of record" is dealt with in *Rule* 2.24:

> 2.24(1) The lawyer or firm of lawyers whose name appears on a commencement document, pleading, affidavit or other document filed or served in an action as acting for a party is a lawyer of record for that party.
>
> (2) When there is a lawyer of record, the party for whom the lawyer of record acts may not self-represent unless the Court permits.
>
> (3) A lawyer of record remains a lawyer of record until the lawyer ceases to be a lawyer of record under these rules.

48 Service of documents other than commencement documents is dealt with in *Rules* 11.20 and 11.21:

> **Service of documents, other than commencement documents, in Alberta**
>
> 11.20 Unless the Court otherwise orders or these rules or an enactment otherwise provides, every document, other than a commencement document, that is to be served in Alberta may only be served by
>
> (a) a method of service described in Division 2 for service of a commencement document,
>
> (b) a method of service described in rule 11.21,
>
> (c) recorded mail under rule 11.22, or

(d) a method of service agreed to under rule 11.3.

Service by electronic method

11.21(1) A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and

(a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and

(b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.

(2) Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

(3) In this rule, "electronic" and "electronic agent" have the same meanings as they have in the Electronic Transactions Act.

49 It is clear from *Rule* 11.17 that subsequent documents in an action can thus be served on the Lawyer of Record:

Service on lawyer of record

11.17(1) A commencement document may be served on a party by being served on the lawyer of record for the party

(a) by being left with the lawyer, being left at the lawyer's office, or being left at another address specified by the lawyer, or

(b) by being sent by recorded mail, addressed to the lawyer, to the lawyer's office.

(2) Service is effected under this rule,

(a) if the document is left with the lawyer or at the lawyer's office or at another address specified by the lawyer, on the date it is left, or

(b) if the document is sent by recorded mail, on the date acknowledgment of receipt is signed.

50 I have not looked at the statement of defence filed on behalf of Mr. Horne to see if a fax number is provided by his lawyer, or an email address. If either was provided, it is clear that the order was validly served on May 15. If not, and if there was no established pattern of serving documents by fax or email between FIC's counsel and the defendants' counsel, the order was in any event effectively served on May 16 when it was left at the lawyer of record's office.

51 There is also no doubt that until July 22 when Mr. Horne provided a statutory declaration as required by the May 15 order, he had neither complied with that order nor with Justice Ross's May 30 order. It remains in issue between FIC and Mr. Horne as to whether he has fully complied with the May 15 order. That is not before me on this application.

52 While Justice Ross's decision on May 30 was oral, and the formal order taken out following the appearance before her was not filed until June 25, orders speak from pronouncement. Appeal periods in some cases may not run until the formal order or judgment has been filed and served, but when a judge makes an order in court, the order speaks from then and is not in limbo and ineffective until the lawyers finalize the terms and file and serve it. It is valid unless and until it is set aside or varied.

53 Mr. Horne's lawyer of record was in court when Justice Ross pronounced her orders on May 30, and Mr. Horne is deemed to know what his lawyer knows about what happened in court (*Bhatnager v. Canada (Minister of Employment & Immigration)*, *infra*, at para. 23). So I do not think that anything turns on the fact that the formal order was not filed until June 25.

54 If I look simply at the May 15 order, there are three things not in dispute: it was granted and is still in effect, it was filed on May 15 and served on Mr. Horne's lawyer on May 15 (or May 16 at the latest) and it was not complied with by Mr. Horne until July 22 at the earliest.

55 To be added to the facts, however, is my finding that Mr. Horne did not personally know about the order until July 4. Between July 4 when he learned of the order, he retained new counsel and prepared and filed his July 22 statutory declaration. The May 15 order gave him 72 hours to comply "from receipt of the order". It took him far longer than 72 hours from July 4 to provide the accounting by way of statutory declaration.

56 There are thus two issues: one is whether Mr. Horne could be in contempt of an order that he did not have personal knowledge of; the other is whether he was in contempt of the May 15 order once he learned of it because it took him some 18 days to provide a statutory declaration instead of the allotted three days.

Civil Contempt

57 Counsel for FIC refers to *Rule* 10.52 relating to civil contempt:

> 10.52(1) Except when a person is before the Court as described in subrule (3)(a)(ii) or (v), before an order declaring a person in civil contempt of Court is made, notice of the application in Form 27 for a declaration of civil contempt must be served on the person in the same manner as a commencement document.
>
> (2) If a lawyer accepts service of a notice of an application seeking an order declaring the lawyer's client to be in civil contempt of Court, the lawyer must notify the client of the notice as soon as practicable after being served.
>
> (3) A judge may declare a person to be in civil contempt of Court if
>
> (a) the person, without reasonable excuse,
>
> (i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,
>
> (ii) is before the Court and engages in conduct that warrants a declaration of civil contempt of Court,
>
> (iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the Court to show cause why the person should not be declared to be in civil contempt of Court,
>
> (iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the person is ordered by the Court to answer,
>
> (v) is a witness in an application or at trial and refuses to be sworn or refuses to answer proper questions, or
>
> (vi) does not perform or observe the terms of an undertaking given to the Court, or
>
> (b) an enactment so provides.

58 Counsel for FIC also raises a number of cases:

Koerner v. Capital Health Authority, 2011 ABQB 191 (Alta. Q.B.)

Bhatnager v. Canada (Minister of Employment & Immigration), [1990] 2 S.C.R. 217 (S.C.C.)

College of Dental Surgeons of British Columbia v. Wu, 2013 BCSC 1986 (B.C. S.C.)

Petty v. Johnston, 2001 ABQB 280 (Alta. Q.B.)

McDonald Estate, Re, 2012 ABQB 704 (Alta. Q.B.)

Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd., 2007 ABCA 204 (Alta. C.A.)

Dreco Energy Services Ltd. v. Wenzel, 2005 ABCA 185 (Alta. C.A.)

Zelazo v. Masson [1992 CarswellAlta 219 (Alta. Q.B.)], 1992 CanLII 6171

Everywoman's Health Centre Society (1988) v. Bridges, 1991 CarswellBC 50 (B.C. C.A.)

Georgia Pacific Canada Inc. v. B.B.F., Local D513, 1999 ABQB 182 (Alta. Q.B.)

West Lincoln (Township) v. Chan, 2001 CarswellOnt 1885 (Ont. S.C.J.)

Kent v. Martin, 2012 ABQB 467 (Alta. Q.B.)

Jackson v. Trimac Industries Ltd. [1993 CarswellAlta 310 (Alta. Q.B.)], 1993 CanLII 7031

Mo v. Ha, 2012 ABQB 29 (Alta. Q.B.)

59 Counsel for Mr. Horne referred me to:

Schitthelm v. Kelemen, 2013 ABQB 42 (Alta. Q.B.)

60 The starting point for an analysis of civil contempt is *Bhatnager v. Canada (Minister of Employment & Immigration)*. As noted by Sopinka J. for a unanimous court, "an allegation of contempt is a matter of criminal (or at least quasi-criminal) dimension" (at para. 14). The requirement for actual knowledge of the order is emphasized, and a declaration of contempt requires proof of all required elements beyond a reasonable doubt.

61 Sopinka J. noted that the common law has "always" required personal service or actual personal knowledge of the court order as a precondition to a finding of contempt. (at para. 15).

62 He referred to the "rebuttable presumption" arising when service has been effected on the solicitor, recognizing that there is the initial onus of proof on the part of the party alleging contempt, and that service or knowledge will often be proven circumstantially. (at para. 17)

63 From the perspective of civil contempt under the *Rules of Court*, I think it is safe to say that the party alleging contempt will have in most circumstances satisfied the onus of proof relating to service and knowledge if the order has been served on the defaulting party's solicitor in accordance with the *Rules of Court*. That element will be proven on the reasonable assumption that the solicitor will immediately notify the client of anything the client should be aware of.

64 That will only be *prima facie* proof, however. It will remain open to the party him or herself to rebut the presumption.

65 This is the common law position, which is applicable to contempt proceedings in Federal Court. The applicable contempt rule in the *Federal Court Rules* is *Rule* 466:

466. Subject to rule 467, a person is guilty of contempt of Court who

(a) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;

(b) disobeys a process or order of the Court;

(c) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;

(d) is an officer of the Court and fails to perform his or her duty; or

(e) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.

66 That rule is to be contrasted with Alberta *Rule* 10.52(3):

(3) A judge may declare a person to be in civil contempt of Court if

(a) the person, without reasonable excuse,

(i) does not comply with an order, other than an order to pay money, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,

67 The wording of the Alberta rule makes it clear that for civil contempt purposes in Alberta, it is not necessary to prove that the person sought to be declared in contempt have actual knowledge of the order he or she is alleged to have breached. It is sufficient if the order has been served in accordance with the rules, as is the case here: service on the lawyer of record.

68 *Schitthelm v. Kelemen*, cited by Mr. Horne, notes at para. 45 that "actual knowledge of the existing requirement or order is normally required", recognizing by inference that there may be situations where actual personal knowledge many not be required.

69 For the purposes of this case, I will assume that *Rule* 10.52(3)(a) is valid and has replaced the common law in Alberta. The contrary was not suggested in argument and I leave it to another day to determine the constitutional validity of the rule.

70 The analysis does not end at determining whether the court has the power to declare an order-breaker in civil contempt. The real issue here is whether the court should exercise that power.

71 The law of civil contempt in Alberta is discussed in *Koerner v. Capital Health Authority* (followed in *Kent v. Martin*) and in *Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*

72 *Bhatnager* is binding in its determination that all elements civil contempt must be proven beyond a reasonable doubt. *Koerner* and *Point on the Bow Development Ltd.* hold that there must be an existing requirement of the court, notice to the person alleged to be in contempt, an intentional act constituting a breach of the requirement and no reasonable excuse for the breach.

73 I am satisfied that FIC has established the first three elements beyond a reasonable doubt. Justice Lee's order is clear, as is Justice Ross's. Justice Lee's order was properly served by FIC on Mr. Horne's lawyer of record. There is also no doubt that the order was not complied with at any time before July 3, 2013.

Reasonable Excuse

74 It remains to be determined if Mr. Horne had a reasonable excuse for failing to comply. There is an initial question as to this element: who has the onus relating to "reasonable excuse"? Does the applicant have to establish the absence of a reasonable excuse, or is there an onus on the order-breaker to prove that he or she had a reasonable excuse, or at least cast reasonable doubt on the absence of a reasonable excuse?

75 Since this is a quasi-criminal proceeding, it is appropriate to look at the criminal law to see how it deals with the *mens rea* element. The closest analogy I can think of is the area of regulatory offences for prosecutions under legislation such as worker safety legislation or environmental legislation. Reasonable excuse is dealt with in cases such as *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.).

76 Civil contempt is certainly in the nature of a public welfare offence. The underlying purpose for the civil contempt power is discussed in para. 31 of *Koerner v. Capital Health Authority*:

> The purpose of a court's civil contempt power is to achieve compliance with court orders and to uphold the court's authority...

77 As confirmed in *Sault Ste. Marie*, the requirement of proving intent in a regulatory or public welfare offence is dispensed with:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. (per Dickson C.J.C. at p. 1325)

78 Once the basic elements of the offence (the *actus reus*) have been proven beyond a reasonable doubt, the order-breaker has the opportunity to establish on a balance of probabilities that he or she did not act negligently or in other words had a reasonable excuse. That is not the same as creating a reasonable doubt as to *mens rea*, but rather is a positive burden of establishing the presence of a reasonable excuse.

79 I accept that as the proper process to follow in a contempt application. The applicant must prove beyond a reasonable doubt the essential elements of the "offence" but for the absence of reasonable excuse. Once that burden is discharged, the onus switches to the order-breaker to establish a reasonable excuse, on the balance of probabilities standard. There are many ways that burden can be discharged, not all of which involve evidence from the order-breaker.

80 I recognize that this may be at odds with *Schitthelm v. Kelemen*, cited by Mr. Horne. In that case, Yamauchi J. says at para. 23 that the applicant must prove *mens rea* (intent). He refers to *Calgary (City) v. Chisan* (2002), 32 M.P.L.R. (3d) 256 (Alta. Q.B.) as to the intentional element. With the greatest respect, I prefer to follow the route for public welfare cases, which essentially reverses the onus relating to *mens rea* onto the "accused".

81 Civil contempt is only quasi-criminal, like regulatory offences, and I see no evil in requiring that a person who has committed the *actus reus* of civil contempt be put to the onus of proving on the civil standard that he or she had a reasonable excuse for non-compliance.

82 That would seem to be in keeping with *Michel v. Lafrentz*, 1998 ABCA 231 (Alta. C.A.):

> [21] It must not be thought that contempt of court always requires an intent to disobey the court, or even an intent to do an act which is in fact forbidden. Where someone is ordered by the court to do something, he or she must use a sufficient degree of diligence to perform, or to have the act performed...

83 That case was quoted with approval in *Broda v. Broda*, 2004 ABCA 72 (Alta. C.A.) at para. 7.

84 Thus I consider that it is up to Mr. Horne to prove that he had a reasonable excuse for not complying.

85 Mr. Horne's sole excuse here is that he did not know about the May 15 order.

86 Here, Mr. Horne's uncontradicted evidence is that he did not know about the order until July 4. There is corroboration of that in his lawyer's representations to the court on July 3. I have no basis to disbelieve Mr. Horne, so he has rebutted the presumption on the balance of probabilities.

87 At common law, this would be a full answer to the charge. But the Alberta rules allow for contempt to be found even in the absence of personal knowledge. The question then becomes whether the absence of personal knowledge can still amount to "reasonable excuse".

88 In some cases, the absence of personal knowledge will amount to a reasonable excuse. The rhetorical question "how can I be punished for not doing something I didn't know I had to do" has some logic to it. An innocent miscommunication may fall into the reasonable excuse category. An honest but mistaken belief may also satisfy the burden. The absence of negligence or any type of questionable conduct or misbehaviour may also satisfy the burden. These examples are not intended to be a closed list.

89 On the other hand, where someone is perceived as playing games with court process and there is a history of difficulties getting service of process, compliance with deadlines, production of records, compliance with undertakings and full compliance with orders, the record may make it much more difficult to discharge the burden of establishing a reasonable excuse.

90 A finding of civil contempt is at the end of any analysis a discretionary remedy in civil proceedings, keeping in mind the underlying rationale for the remedy: ensure compliance with orders and promote respect for the proceedings.

91 Here, from the evidence before me, the lawsuit had not been particularly active for some time before the May 15 order. There was no apparent need for Mr. Horne and his lawyer to be in regular contact concerning this matter. This is the first indication of any lack of compliance with procedural matters.

92 I am satisfied that Mr. Horne has provided reasonable excuses for not complying with Justice Lee's May 15 order and Justice Ross's May 30 order. His uncontradicted evidence is that he was unaware of either order until July 4, when he learned of my July 3 order and warrant. While the timing of events is suspicious - a major transfer of funds the day after Justice Ross confirmed the need for compliance with the May 15 order - suspicions are not a proper basis for a finding of contempt.

93 As to whether Mr. Horne was in contempt of the May 15 order after he learned of it on July 4, I recognize that he took some two and a half weeks to provide a statutory declaration. It is arguable that because of the time taken, he was in contempt. However, his statutory declaration addresses this to some extent and he says on learning of the order he immediately began "taking steps to prepare the within Statutory Declaration". I am aware that since that time, discussions have continued between his new counsel and counsel for FIC as to payment into court of funds and providing or arranging security for other funds, as well as other issues.

94 I am not prepared, on the evidence before me, to conclude that Mr. Horne's actions since learning of the May 15 order meet the requirements for contempt, being a deliberate or wilful failure to act, without adequate excuse. This is not a situation where Mr. Horne ignored the order after July 4; he took reasonable steps to comply with the statutory declaration aspect of the matter. Retrieving funds paid to third parties or out of province has proven difficult, and Mr. Horne has been cooperative in doing what is within his power. Failure to pay monies is generally not something for which contempt remedies are available in any event.

95 In the result, I do not find Mr. Horne guilty of contempt.

Costs

96 However, that does not end the matter. He has failed to comply with a court order. Had he complied with the May 15 order, the majority of the funds in question would have been easily frozen. The plaintiff has been put to considerable expense to get him to comply with the order, and to put itself in the same position it would have been in had the order been complied with. None of the expenses in BC would have been incurred.

97 I have already required Mr. Horne to pay FIC's solicitor and client costs in connection with the security arrangements relating to some of the funds which are in third party hands.

98 FIC seeks payment of its other costs on a solicitor and own client basis.

99 The costs provisions of the *Rules of Court* are found in *Rules* 10.29-10.31:

General rule for payment of litigation costs

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

When costs award may be made

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

(a) in respect of an application or proceeding of which a party had notice, after the application has been decided,

(b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37.

Court-ordered costs award

10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,

(i) an indemnity to a party for that party's lawyer's charges, or

(ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party

(i) in an assessment of costs before the Court, or

(ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

(4) The Court may adjust the amount payable by way of deduction or set off if the party that is liable to pay a costs award is also entitled to receive an amount under a costs award.

(5) In appropriate circumstances, the Court may order, in a costs award, payment to a self-represented litigant of an amount or part of an amount equivalent to the fees specified in Schedule C.

(6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

100 It is trite to say that costs are in the discretion of the Court. Here, FIC has been mainly successful in enforcing Justice Lee's May 15 order. Having regard to the underlying problem caused by FIC's allegedly inadvertent or mistaken discharge of the caveat against Mr. Horne's lands, I do not consider it appropriate to award any costs of that application or steps leading up to it. Those costs are more properly in the hands of the eventual trial judge, as are the costs of the application before Justice Ross on May 30.

101 The costs of the application before me on July 3, 2013 and the expenses incurred in relation to it, and the subsequent appearances to ensure compliance with the May 15 order, should be dealt with now. These are all costs and expenses which would not have been incurred by FIC had Mr. Horne immediately complied with the May 15 order.

102 As is clear from Rule 10.31, the court has the jurisdiction to award a range of costs from no costs to Schedule C costs to full indemnity costs. In this regard, I am not assisted by most of the cases cited by FIC. Most of the costs awards in those cases followed a finding of civil contempt, which is not the case here.

103 *Everywoman's Health Centre Society (1988)* is of little assistance. While it does not focus on costs where contempt has been found, it deals with alleged misconduct (overzealous advocacy) in litigation.

104 Ultimately, I am left with *Jackson v. Trimac Industries Ltd.*, 1993 7031CanLII. While there have been countless Alberta decisions dealing with costs since then, including many from the Court of Appeal, this cases is probably the most often cited and gives unchallenged clear direction on the available options. *Mo v. Ha* quotes extensively from *Jackson v. Trimac Industries Ltd.*

105 Paras. 28 - 32 of *Jackson v. Trimac Industries Ltd.* are instructive:

> [28] The plaintiffs are seeking indemnification from the defendants for the cost of the lawsuit initiated by them to recover monies which they claim were rightfully payable to them. Indemnification in this instance is equivalent to solicitor and his own client costs and not solicitor-client costs, adopting the meaning found by Veit J. in Sonnenberg (supra). In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:
>
> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (Reese);
>
> 2. cases in which justice can only be done by a complete indemnification for costs (*Foulis v. Robinson*);
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (Sonnenberg);
>
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson);
>
> 5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v. Newton*);
>
> 6. defendants found to be acting fraudulently and in breach of trust (*Davis v. Davis*);
>
> 7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v. Tecumseh Road Builder et al.*),
>
> 8. fraudulent conduct (Sturrock);
>
> 9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (Pharand).
>
> [29] Mention of Stevenson J.A. and Côté J.A. unleashes a plethora of cases involving the application of R. 601(1) referred to in that work at pp. 1414 to 1417 inclusive (1992 edition). Approximately 100 examples are given where sufficient grounds exist or do not exist for awarding party and party costs on a solicitor and client basis. This demonstrates that a careful analysis has to be made of the facts in each case and also illustrates the wide discretion to be exercised by the trial judge who had the benefit of seeing and hearing the witnesses and distilling the essence of the lawsuit.
>
> [30] Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award.

[31] Madam Justice Veit appears to agree with the above propositions but goes on to decide that positive misconduct gives the court reason to take such conduct into account [p. 81] "one more time on the costs issue in determining whether the positively misconducting party was 'contemptuous' ... of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his."

[32] Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue to use the words of Madam Justice Veit in Sonnenberg.

106 This case falls into several of the categories described by Justice Hutchinson, but most clearly into 1 - misconduct in the litigation. While I have not found Mr. Horne to be in contempt of court, the absence of personal knowledge is the result of miscommunication, or no communication, between him and his lawyer and that is (*vis-a-vis* the other party) is clear misconduct. No reasonable excuse for the absence of communication has been put forward. There is no evidence at all before me explaining why Mr. Horne was not involved in giving instructions to the lawyer or receiving advice as to the results of applications from his lawyer. His lawyer said on July 3 before me that he had lost contact with Mr. Horne and the only address he had was the property which had been sold.

107 That may well be the case, but the lawyer commenced an application to set aside the May 15 order on behalf of Mr. Horne and Mr. Lennie. Bringing an application without instructions can easily be characterized as misconduct. I have no information as to the relationship among Mr. Horne and Mr. Lennie in relation to instructing their joint lawyer. The lawyer may have left communications to Mr. Lennie. But these are issues to be sorted out among Mr. Horne, Mr. Lennie and their lawyer. FIC is not responsible for any of that, and ought not be put to extra expense as a result.

108 Communications between solicitor and client are a two way street. The lawyer should at all times keep his or her client informed. Clients should be proactive and ensure that they are fully informed of significant occurrences in the matters being handled for them by a lawyer. There is shared responsibility - at least *vis-a-vis* the opposing party - for the consequences of failed communications.

109 Where there is misconduct and the other party has been put to considerable expense as a result of factors entirely within the control of the other party, category 2 of Justice Hutchinson's list is also engaged: the interests of justice.

Conclusion on Costs

110 I am left to determine whether full indemnity costs (solicitor and his own client) or some lesser measure is appropriate. Mr. Fitz on behalf of FIC has provided copies of his firm's bills to FIC starting with May 31, 2013. Also attached are bills from a British Columbia firm which was involved (and apparently remains involved) to secure funds held in British Columbia. Total fees and disbursements plus unbilled fees and disbursements are $57,059.80.

111 The British Columbia bills relate solely to enforcing the May 15 order in B.C. None of that would have been necessary had Mr. Horne complied with Justice Lee's order. He should have been aware of it immediately after it was served on his lawyer. He should have been made aware of Justice Ross's order immediately after pronouncement. The costs to FIC could have been avoided entirely if there had been effective communications here. Such communications are essential to the proper conduct of litigation and the effectiveness of court orders. It is appropriate that these expenses be reimbursed to FIC on a full indemnity basis.

112 Those fees, disbursements and unbilled fees and disbursements should be paid in full by Mr. Horne.

113 As for the charges by McLennan Ross, it is impossible from the filed materials to determine what portion of the fees relates solely to enforcement of the May 15 order against Mr. Horne. Some of the time billed undoubtedly relates to enforcing

the order against Mr. Lennie, and dealing with the application to set aside the order before Justice Ross on May 30. Likely, no fees or disbursements incurred before May 30 should be part of a costs award against Mr. Horne at this stage of the proceedings.

114 I am aware that there were issues with Mr. Lennie's compliance during the month of June, and to the extent any of those issues are reflected in the bills put forward in the materials filed for this application, they should not be recoverable from Mr. Horne. Similarly, any steps in the action itself, or in defending the application to set aside the May 15 order are not recoverable at this stage. I am aware that Mr. Pasquill was presented for cross-examination during the summer months and I assume the fees and disbursements in relation to that are included in the accounts. Those are not recoverable at this stage.

115 Ultimately, I conclude that FIC should recover on a full indemnity (solicitor and own client) basis those portions of the McLennan Ross fees and disbursements which relate to enforcement of the May 15 order against Mr. Horne. Had Mr. Horne been aware of the May 15 order in a timely way, FIC would have had the required information as to the funds received and Mr. Horne would not have disbursed the funds in the way he did. All of the major disbursements were made after the May 15 order. FIC has had to spend monies tracing the funds, and bringing numerous proceedings in Alberta and B.C. The B.C. proceedings have been coordinated through Alberta Counsel. It would in these circumstances be inappropriate to require FIC and its lawyers to justify, after the fact, every bit of research and minute of time spent pursuing appropriate remedies.

116 It may be a difficult task to determine which parts of the accounts and time spent relate to which parts of the litigation.

117 FIC should provide reasonable detail of their accounts to Mr. Horne. It may be that there will be parts of the time records which should be expurgated to preserve solicitor client privilege as to strategy and the like. If the parties are unable to agree on the total of fees and disbursements, they may speak to me about a means of resolving any disagreement. It is my hope that the process of finalizing the appropriate amount will not become a major task and become a trial within the trial. The parties should be focusing their efforts on the underlying litigation.

118 If there is any issue as to the manner of payment of the costs ordered, I will deal with that after the quantum of costs has been determined.

Application dismissed as to contempt; application allowed as to costs.