9 Accordingly, I am satisfied that it is not premature to award costs with respect to the liability trial.

Quantification of costs

10 The plaintiff argues that he should receive costs calculated at 45% of his solicitor client legal bill. While his solicitor client costs have not been assessed pursuant to the Rules, the plaintiff incurred $389,711.78 in legal fees for all matters relating to liability issues, from the opening of his file through to the submission of written legal arguments after trial. He seeks costs of $175,370.03, plus disbursements.

11 The Plaintiff relies on the recent decision of *Remington v. Crystal Creek Homes Inc*, 2018 ABQB 644 (Alta. Q.B.), as well as historic decisions, including: *Hill v. Hill*, 2013 ABCA 313 (Alta. C.A.); and *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, **1999 ABQB 801** (Alta. Q.B.), which he argues stand for the proposition that a proper costs award should approximate between 40%-50% of the solicitor client fee account.

12 The defendant argues that partial indemnity costs have traditionally been reserved for circumstances where damages claimed are substantially in excess of Column 5, the litigation is significantly complex, or there has been misconduct by the party who faces liability for costs; they further assert that none of these factors apply and therefore Schedule C should be used to determine the quantification of costs. The defendant submits that based on the damages claimed by the plaintiff in his pleadings a proper costs award should be calculated in accordance with Column 3 of Schedule C, with an additional 25% gross up of that amount to account for inflation.

13 I agree with the defendant's argument that Schedule C should be used to calculate the costs award.

14 Schedule C costs serve many useful purposes in litigation. First, they reward a successful party by compensating them for the significant steps taken in the litigation. Second, they allow the parties to effectively measure the risk of costs associated with the litigation. This assists in achieving a third purpose — encouraging parties to abide by the foundational rules which promote resolution of the issues between the parties in a practical and efficient manner.

15 Relying on a rule of thumb practice that a proper costs award should approximate between 40%-50% of the incurred solicitor client fees does not, in my view, achieve these purposes. First, it compensates not for the significant steps in the court process, but for all legal expenses incurred without a safeguard for reasonableness. Second, it does not allow the parties to effectively analyze the risk of costs in litigation as it is impossible to know hourly rates charged or the amount of time spent on various steps until the conclusion of the litigation. Finally, an award of partial indemnity costs measured on the basis of solicitor client fees charged, could undermine the spirit of the foundational rules. These comments are in no way a criticism of the solicitor client fee account before me. I am wholly satisfied that counsel acted reasonably in their pursuit of the claim. I am simply making the point that when measuring appropriate costs, a principled approach which considers the purpose of costs, in terms of Court process, should be applied. The use of Schedule C imports certainty in cases where the parties have conducted themselves reasonably and advanced meritorious claims and defences.

16 Madam Justice D.L. Shelley's decision in *Weatherford Canada Partnership v. Addie*, 2018 ABQB 571 (Alta. Q.B.), provides a comprehensive review of the case law with respect to when partial indemnity of solicitor client fees, a multiplier approach to Schedule C, or hybrid awards are appropriate. Overwhelmingly, the Courts use the percentage of indemnity method where there is misconduct, significant complexity, or damages claimed in excess of Column 5. Multipliers and hybrid costs are reflected in cases where there is no misconduct and the litigation is not overly complex or protracted.

17 In this case there was no misconduct. The matter, although novel, was not overly complex. The plaintiff's case consisted of two lay witnesses and an expert; the defendant's case consisted of one lay witness and an expert. The vast majority of trial time was taken up with expert testimony relating to the issue of standard of care. The parties had filed both an Agreed Statement of Facts and an Agreed Exhibit Book, steps which significantly reduced the amount of necessary trial time. I am therefore satisfied that Schedule C is the appropriate measure of costs in this case.

18 Where damages are unascertained and the issues of liability and quantification of damages have been bifurcated, assessing costs based on the claimed amount is the most fair and reasonable resolution of costs. This reflects the parties'

knowledge regarding the risk of costs in proceeding to trial. In this case the plaintiff claimed damages in the amount of $154,602.73, plus future damages in an amount to be determined at trial. Therefore, Column 3 applies.

19 In considering whether there should be a gross-up or multiplier applied to Column 3 costs, I have considered both the fact that the costs schedule is grossly out of date in terms of value and the conduct of the parties in relation to the litigation. There being no misconduct, it is my view that Column 3 costs should be grossed-up to reflect a true monetary value. In that regard, evidence was before me at the costs hearing indicating a rate of inflation of 46.60%. Accordingly, a 46.60% gross-up is applied to approximate reasonable costs in 2018 for the steps taken to bring this matter to trial.

20 The plaintiff is awarded costs in the sum of $70,294.70, reflecting base costs of $47,950.00 grossed up by 46.60%.

Expert Disbursement

21 The plaintiff's expert, Dr. Randall Atlas, is one of the leading American experts in Crime Prevention Through Environmental Design (CPTED) as relates to the design of public transit systems. Dr. Atlas was retained in August 2014, following completion of Questioning. Tasks billed in relation to his invoicing, include: a site inspection in Calgary; compendious document review; consultation with counsel in relation to obtaining transit and crime statistics, bylaws, and policies in other jurisdictions; and his attendance throughout trial, including time spent in advising counsel on cross-examination issues relating to the competing expert and trial evidence.

22 Dr. Atlas' expert fees totaled $117,941.53 Canadian dollars. The test for recovery of expert fees is whether it was reasonable to retain the expert in light of the circumstances that existed at the time: *Seidel v. Kerr*, 2004 ABCA 157 (Alta. C.A.). The plaintiff argues it was necessary to retain an expert to establish the standard of care owed by the defendant and that all of the items charged were reasonably associated with the issues raised at trial. Further, he argues that the fact Dr. Atlas was expensive is a reflection of his level of expertise, and should not be an overriding factor in the review of reasonableness.

23 The defendant argues that several factors should be considered in assessing the reasonableness of Dr. Atlas' fee accounts. Those include: that Dr. Atlas was an expert outside of the jurisdiction, that he charged a significant hourly rate, that he charged significantly more than the defendant's own expert ($17,731.50), that his document review was excessive in light of the fact that his trial opinion rested on assumptions given to him by counsel, and that not all of the opinion testimony he gave was accepted by the Court in its final findings.

24 It should be noted that Dr. Atlas was qualified as an expert in CPTED, whereas the defence expert, Dr. Sundberg, was not. As a result, comparing their respective accounts for services rendered is not a reasonable manner by which to assess the reasonableness of the fee charged. In addition, while all of the opinions provided by Dr. Atlas were not accepted by the Court, his testimony with respect to the standard of care was necessary for the plaintiff to meet the burden of proof, and was relied upon by the Court to find the defendant liable. The reality is that parties to litigation rely on experts to shape their case for trial. This includes investigatory matters and attendance at trial to assist with the formulation of cross-examination questions and strategy. At the time of his retainer, I am satisfied that it was reasonable for the plaintiff to engage Dr. Atlas and his services were reasonable with respect to the issues before the Court.

25 Accordingly, I allow the disbursement with respect to Dr. Atlas' full fee account, save for the Banff Springs Hotel charge of $852.00. That figure will be amended to $286.00 to reflect the equivalent two-night stay at the Hilton Garden Inn in Calgary.

26 The remaining disbursements were not in dispute between the parties.

Conclusion

27 As a result, in relation to the liability trial only, the plaintiff is awarded party and party costs in the sum of $70,294.70, plus Dr. Atlas' full fee account (adjusted for the hotel expenses), plus the additional disbursements agreed to by the parties.

TAB 11

2018 ABQB 551
Alberta Court of Queen's Bench

Athabasca Minerals Inc. v. Syncrude Canada Ltd.

2018 CarswellAlta 1451, 2018 ABQB 551, [2018] A.W.L.D. 2956, [2018] A.W.L.D. 2975, [2018] A.W.L.D. 2976, [2018] A.W.L.D. 2990, [2018] A.W.L.D. 3006, 25 C.P.C. (8th) 258, 294 A.C.W.S. (3d) 488, 77 Alta. L.R. (6th) 139

Athabasca Minerals Inc. (Plaintiff / Defendant by Counterclaim) and Syncrude Canada Ltd. (Defendant / Plaintiff by Counterclaim)

C.M. Jones J.

Judgment: July 19, 2018
Docket: Calgary 1201-13727

Proceedings: additional reasons to *Athabasca Minerals Inc. v. Syncrude Canada Ltd.* (2017), 95 C.P.C. (7th) 38, 46 Alta. L.R. (6th) 391, 2017 ABQB 47, 2017 CarswellAlta 75, C.M. Jones J. (Alta. Q.B.)

Counsel: Marco Poretti, for Plaintiff / Defendant by Counterclaim
Bernard J. Roth, for Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Corporate and Commercial; Natural Resources

Related Abridgment Classifications

Debtors and creditors
III Garnishment
  III.5 Attachability
    III.5.1 Proceeds of litigation
      III.5.l.iii Costs

Headnote

Debtors and creditors --- Garnishment — Attachability — Proceeds of litigation — Costs
Defendant carried on oil sands extraction and processing operation, and plaintiff managed removal of sand and gravel on behalf of province from certain deposit ("pit") — Plaintiff commenced action against defendant, asserting that defendant removed surface materials from pit and failed to pay for those materials and for full amount of management fees payable to plaintiff — Defendant responded with counterclaim, alleging that plaintiff wrongfully permitted excavation, removal and use of reclamation material from area of defendant's mineral lease that overlapped with area under management by plaintiff — Defendant brought unsuccessful applications for preservation order, attachment order, and Mareva injunction — Parties made submission on costs — Costs were awarded in favour of plaintiff in amount of $89,821, representing fees calculated as 45 per cent of legal costs plaintiff asserted were actually incurred — Disbursements and other charges were awarded as set out in plaintiff's proposed Bill of Costs with exception of expenses from out of town counsel — Costs were payable forthwith as failure to award costs forthwith would invite misuse of prejudgment relief process — Ordering defendant to pay percentage of plaintiff's reasonable legal fees incurred to defend application was appropriate way to determine plaintiff's reasonable and proper costs — Inflation was already accounted for in actual fees charged to plaintiff by counsel.

Table of Authorities

Cases considered by *C.M. Jones J.*:

Blaze Energy Ltd. v. Imperial Oil Resources (2014), 2014 ABQB 509, 2014 CarswellAlta 1498 (Alta. Q.B.) — considered

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 114 C.R.R. (2d) 108, 2003 CSC 71 (S.C.C.) — referred to

Chisholm v. Lindsay (2013), 2013 ABQB 589, 2013 CarswellAlta 1904, 91 Alta. L.R. (5th) 349, 571 A.R. 260 (Alta. Q.B.) — considered

Cogent Group Inc. v. EnCana Leasehold Limited Partnership (2014), 2014 ABQB 593, 2014 CarswellAlta 1744, 13 Alta. L.R. (6th) 166, 597 A.R. 178 (Alta. Q.B.) — followed

Enviro Trace Ltd. v. Sheichuk (2015), 2015 ABQB 28, 2015 CarswellAlta 35, 25 Alta. L.R. (6th) 193, 29 C.C.E.L. (4th) 291 (Alta. Q.B.) — referred to

Hansraj v. Ao (2002), 2002 ABQB 772, 2002 CarswellAlta 1064, 4 Alta. L.R. (4th) 147, [2002] 11 W.W.R. 688, 314 A.R. 283 (Alta. Q.B.) — followed

Hill v. Hill (2013), 2013 ABCA 313, 2013 CarswellAlta 1785, (sub nom. *Hill v. Hill Family Trust*) 561 A.R. 50, (sub nom. *Hill v. Hill Family Trust*) 594 W.A.C. 50, 3 Alta. L.R. (6th) 302 (Alta. C.A.) — referred to

Johannesen, Re (2002), 2002 ABQB 946, 2002 CarswellAlta 1273, [2003] 1 W.W.R. 147, 6 Alta. L.R. (4th) 304, 321 A.R. 250 (Alta. Q.B.) — referred to

LSI Logic Corp. of Canada Inc. v. Logani (2001), 2001 ABQB 968, 2001 CarswellAlta 1733, [2002] 4 W.W.R. 531, 100 Alta. L.R. (3d) 49 (Alta. Q.B.) — referred to

Marathon Canada Ltd. v. Enron Canada Corp. (2008), 2008 ABQB 770, 2008 CarswellAlta 2068, 100 Alta. L.R. (4th) 356, 447 A.R. 89 (Alta. Q.B.) — referred to

Mikkelsen v. Truman Development Corp. (2016), 2016 ABQB 255, 2016 CarswellAlta 833 (Alta. Q.B.) — considered

Murphy Oil Canada Ltd. v. Predator Corp. (2005), 2005 ABQB 134, 2005 CarswellAlta 806, 379 A.R. 388 (Alta. Q.B.) — considered

RVB Managements Ltd. v. Rocky Mountain House (Town) (2015), 2015 ABCA 304, 2015 CarswellAlta 1771, 609 A.R. 55, 656 W.A.C. 55 (Alta. C.A.) — followed

Shefsky v. California Gold Mining Inc. (2015), 2015 ABQB 525, 2015 CarswellAlta 1857 (Alta. Q.B.) — followed

Stewart Estate v. 1088294 Alberta Ltd. (2016), 2016 ABCA 144, 2016 CarswellAlta 820, 35 Alta. L.R. (6th) 1, [2016] 9 W.W.R. 230 (Alta. C.A.) — referred to

Stonewater Group of Restaurants Inc. v. Mikes Restaurants Inc. (2005), 2005 ABQB 964, 2005 CarswellAlta 1906 (Alta. Q.B.) — referred to

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — referred to

566320 Alberta Ltd. v. Lethbridge (City) (2005), 2005 ABCA 244, 2005 CarswellAlta 959, 257 D.L.R. (4th) 311, 371 A.R. 270, 354 W.A.C. 270, 20 C.P.C. (6th) 369, 53 Alta. L.R. (4th) 90, 19 M.P.L.R. (4th) 48 (Alta. C.A.) — referred to

Statutes considered:

Civil Enforcement Act, R.S.A. 2000, c. C-15

s. 17 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 10.29(1) — considered

R. 10.31(1)(a) — considered

R. 10.31(3)(a) — considered

R. 10.33 — referred to

R. 10.33(1) — considered

R. 10.33(1)(g) — referred to

R. 10.33(2) — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *Athabasca Minerals Inc. v. Syncrude Canada Ltd.* (2017), 2017 ABQB 47, 2017 CarswellAlta 75, 95 C.P.C. (7th) 38, 46 Alta. L.R. (6th) 391 (Alta. Q.B.).

***C.M. Jones J.*:**

1 Syncrude Canada Ltd. ("*Syncrude*") made application against Athabasca Minerals Inc. ("*AMI*") for various forms of prejudgment relief. Syncrude sought the following interim and interlocutory orders:

1. Preserving all reclamation soil — in situ and stockpiled subsoil and overburden - within the boundaries of Mineral Surface Lease 973220 granted by the Province of Alberta in favour of Syncrude pending trial and judgment (the "Preservation Order");

2. Alternately, directing AMI to pay $55 million or such other amount as the Court deems just, into Court, and delivering possession of the reclamation soil to Syncrude;

3. Attaching the assets of AMI pursuant to s. 17 of the Civil Enforcement Act, RSA 2000, c-15 ("CEA"), pending trial and judgment (the "Attachment Order");

4. Enjoining AMI from dealing with, conveying, selling, encumbering or otherwise disposing of any interests in personal or real property or assets in its possession or control and wherever located, without further order of the Court, pending trial and judgment (the "Mareva Injunction"); and

5. Costs.

2 My decision is reported at *Athabasca Minerals Inc. v. Syncrude Canada Ltd.*, 2017 ABQB 47 (Alta. Q.B.). I declined to grant any of the relief sought by Syncrude as outlined in 1 through 4 above.

3 The parties could not agree on costs. I directed them to make written submissions.

Background

4 Syncrude and AMI found themselves in dispute concerning the rights conferred on them under various agreements with, and approvals issued by, the Province of Alberta.

5 Syncrude carries on an oil sands extraction and processing operation. AMI managed the removal of sand and gravel on behalf of the Province from a deposit in northern Alberta.

6 In 2012, AMI commenced an action against Syncrude. AMI asserted that Syncrude was indebted to it in the approximate amount of $620,000.00. AMI asserted that Syncrude removed surface materials from the deposit in issue and failed to pay for those materials and for the full amount of management fees payable to AMI.

7 Syncrude responded with a counterclaim in the amount of $68,000,000.00. It alleged that AMI wrongfully permitted excavation, removal and use of reclamation material from an area of Syncrude's mineral lease that overlaps with the area under management by AMI. Syncrude asserted a right to exclusive use and possession of that material for purposes of meeting its reclamation obligations.

8 AMI claimed that Syncrude's request for prejudgment relief was a litigation tactic designed to put it out of business and deprive it of the financial resources it would need to advance its action against Syncrude.

Costs Submission

9 AMI proposes that it receive costs on a party-and-party basis, at a multiple of three times column 5, found at Division 2 of Schedule C of the *Alberta Rules of Court, Alta Reg 124/2010* ("*Rules*"). In connection with its request, AMI submits a Bill of Costs.

10 That Bill of Costs seeks:

a) Fees	$	98,518.32
b) Disbursements (subject to 5% GST)	$	12,042.41
c) Disbursements (not subject to GST)	$	463.89
d) Other Charges (subject to 5% GST)	$	1,113.16
e) GST	$	657.78
	$	112,795.56

11 Syncrude proposes that costs be in the cause, on a party-and-party basis. However, should the Court be inclined to award costs payable forthwith, Syncrude proposes its own Bill of Costs. That Bill of Costs proposes fees of $18,550.00.

12 In support of its Bill of Costs, AMI argues that:

1. It should be entitled to enhanced costs;

2. An inflation factor should be applied in arriving at a costs award; and

3. AMI should be entitled to costs forthwith and I should not direct that costs in respect of the matter before me be in the cause.

13 AMI's comments regarding costs awards generally may be summarized as follows:

1. Costs are discretionary and may be awarded in any amount the Court considers appropriate: Rule 10.33; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.) ("Okanagan

Indian Band");

2. Rule 10.33(1) identifies considerations which may be taken into account in making a costs award;

3. The Court may consider the actual legal bills of the successful party: Rule 10.33(1)(g); *Hill v. Hill*, 2013 ABCA 313, 3 Alta. L.R. (6th) 302 (Alta. C.A.) ("Hill");

4. Rule 10.33(2) identifies considerations the Court may take into account in imposing a costs award; and

5. Costs may be used to sanction behaviour that increases the duration and expense of litigation or is otherwise unreasonable or vexatious: Okanagan Indian Band at para 25;

Enhanced Costs

Applicable Column

14 AMI argues that it should be entitled to enhanced costs, claiming that Syncrude's application for prejudgment relief threatened AMI's ability to continue operating. AMI asserts that had the relief sought been granted, it would have been incapable of pursuing its debt claim against Syncrude and defending Syncrude's counterclaim.

15 AMI argues that had Syncrude been successful in its application before me, it would have allowed Syncrude to circumvent the litigation process. It would have effectively allowed Syncrude to obtain the remedy it ultimately sought in the litigation.

16 In essence, AMI asks this Court to impose a form of penalty on Syncrude. It asserts that Syncrude was misusing its right to request prejudgment relief by seeking, through the vehicle of prejudgment relief, to avoid the orderly administration of justice by means of a trial.

17 AMI argues that Syncrude sought to have AMI pay $55 million into Court in addition to any other relief sought.

18 I agree with AMI that, for purposes of determining what, if any, column is applicable, Syncrude requested a monetary award. Whatever attachment relief Syncrude sought was in addition to its request for $55 million, which can be viewed as a monetary proxy for the value it placed on sand and gravel *in situ*.

19 Syncrude does not appear to dispute the assertion that column 5 is applicable. It employs column 5 in arriving at fees depicted in its draft Bill of Costs.

20 Clearly, $55 million sought is well beyond the range contemplated by column 5 of Schedule C.

Degree of Appropriate Enhancement, if Any

21 AMI argues that this is an appropriate case to apply a multiplier to the various column 5 items shown on its draft Bill of Costs. It asserts that an award of costs should indemnify the successful party for approximately 40% to 50% of a lawyer's reasonable bill: *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.*, 1999 ABQB 801 (Alta. Q.B.) at para 22, (1999), 251 A.R. 101 (Alta. Q.B.); *Marathon Canada Ltd. v. Enron Canada Corp.*, 2008 ABQB 770 (Alta. Q.B.) at para 30, (2008), 100 Alta. L.R. (4th) 356 (Alta. Q.B.) ("*Marathon*"); *LSI Logic Corp. of Canada Inc. v. Logani*, 2001 ABQB 968 (Alta. Q.B.) at para 16, (2001), [2002] 4 W.W.R. 531 (Alta. Q.B.) ("*LSI*"); *Stewart Estate v. 1088294 Alberta Ltd.*, 2016 ABCA 144 (Alta. C.A.) at para 26, [2016] A.J. No. 454 (Alta. C.A.).

22 It argues that this Court should apply a multiplier to column 5 items, the appropriate multiplier having been arrived at with reference to the considerations laid out in *Rules* 10.33(1) and 10.33 (2), and its conclusions based on its review of the decisions in *Marathon*; *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.) at para 81, [2014] A.J. No. 916 (Alta. Q.B.) ("*Blaze*"); *Hill*; *Murphy Oil Canada Ltd. v. Predator Corp.*, 2005 ABQB 134, 379 A.R. 388 (Alta. Q.B.)

("*Murphy*").

23 AMI cites various cases where multipliers have been used. It alleges that in certain of these cases, multiples were applied in the absence of any assertions of misconduct. In other words, multiples were not applied to punish the unsuccessful party.

24 AMI cites the decision in *Blaze*, referred to above, where this Court applied a 1.5 multiple to column 5 items, noting that the litigation was commercially significant to the parties.

25 In *Murphy*, where a 6 multiple was employed partly in response to the conduct of the parties, AMI notes that the Court did not accept the defendant's argument that a multiple should not be used in what might be referred to as summary proceedings, as opposed to a trial.

26 The Court in *Murphy* referred to this Court's finding in *LSI*. There, the Court noted that "the time of the actual hearing is not a proper gauge of the complexity of the issues": *LSI* at para 9. AMI argues that Syncrude's application took two days, involved significant preparation during a compressed period of time, and involved a significant volume of materials, including voluminous affidavits, transcripts and undertaking responses from witness testimony.

27 AMI understates the matter. As Syncrude was the applicant, most of the material filed was prepared by it. AMI was required to respond to those filings.

28 Just how much material did the parties file? Five days had to be allocated to reading time.

29 Seven days of Court time were thus consumed. As the matter related to Syncrude's request for immediate injunctive relief, it became necessary for the Court to make special arrangements to allocate time to hear Syncrude's request.

30 AMI notes that a multiple of column items is not the only option available in making an award of enhanced costs. It cites this Court's decision in *Mikkelsen v. Truman Development Corp.*, 2016 ABQB 255 (Alta. Q.B.) at paras 48-49, 2016 CarswellAlta 833 (Alta. Q.B.) ("*Mikkelson*"). There, the Court noted:

> 48 When costs awarded pursuant to the Tariff would be inadequate, the Court has numerous options available, as discussed by the Court of Appeal in ***Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.***, 1998 ABCA 118 (Alta. C.A.) at para 4, leave to appeal to SCC refused, 25594 (1 May 1997) [1997 CarswellAlta 1286 (S.C.C.)]:
>
> > ...There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some form of solicitor-client costs, and so forth. Several modes of adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.
>
> 49. Pursuant to ***Rule*** 10.31(1)(b)(ii), this Court may award a lump sum instead of or in addition to assessed costs.

31 AMI cites *Mikkelson* for the proposition that a party's actions may justify an award which goes some considerable way to indemnifying the successful party in respect of their actual legal costs.

32 AMI argues that the fact that Syncrude failed in its application means that AMI should receive enhanced costs. It claims that AMI's actual legal costs relating to Syncrude's application were $199,604.00.

33 It argues that it should receive a fair and reasonable indemnity of 40% to 50% of its actual legal costs. This, it asserts, should be a bare minimum.

34 Indeed, AMI argues that it should receive global indemnity of 50% to 60% of its actual legal costs because Syncrude is guilty of misconduct. AMI offers, in support of this allegation, the observation that Syncrude's counterclaim was one hundred times larger than AMI's claim against Syncrude. Further, it argues, had Syncrude been successful in its request for prejudgment relief, AMI would have had to cease operations and have gone out of business.

35 AMI takes the position that Syncrude's application for prejudgment relief was entirely unnecessary. It only served to increase the time and resources spent on what might become a long and protracted trial.

36 Lastly, in its request for enhanced costs, AMI cites para 155 of my decision. There, I noted that:

> I mention in passing that AMI pointed out that a prejudgment preservation order should not be used as a tactical weapon against a defendant who has a valid defense to the claim: see ***1773907 Alberta Ltd v Davidson*** at para 73. I have had some disquiet at the fact that Syncrude's response to AMI's action against it included a counterclaim for more than one hundred times the amount sought by AMI. To be sure, Syncrude is free to assert a counterclaim in whatever amount it thinks fit. Nevertheless, the Court must exercise great care to ensure that the quantum of an as yet unproven claim does not, by itself, influence the assessment of the merits of the application for prejudgment relief. Prejudgment relief, especially when it has the potential to limit the respondent's ability to carry on business and to proceed with litigation, must not be allowed to be used improperly.

37 This, AMI suggests, evidences the Court's condemnation of Syncrude's conduct in this matter and supports the request for enhanced costs.

38 In response, I would note that it was AMI that raised the issue of tactics. I commented that Syncrude was free to assert a counterclaim in whatever amount it thought fit.

39 I noted that it is the Court's responsibility to exercise care to ensure that it does not allow the quantum of a claim to overwhelm a consideration of the merits of an application for prejudgment relief. I did not say that it was the parties' responsibility to limit the extent of relief they believe they are otherwise entitled to receive just because the quantum of a claim and of a counterclaim are vastly disproportionate.

40 I noted that I had "some disquiet" regarding the size of Syncrude's counterclaim in relation to AMI's original claim. That disquiet served to remind this Court of the importance of focusing on the substantive merits of the parties' positions and not to be unduly influenced by relative sizes of the amounts claimed.

41 In any event, AMI concludes by seeking a multiple of three applied to column 5 amounts.

42 Syncrude argues that if costs are payable at this time, they should be computed with reference to its draft Bill of Costs. As noted above, it agrees that column 5 is applicable. It disputes AMI's claim for disbursements in respect of travel costs for out-of-town counsel for a matter that was commenced in the Judicial Centre of Calgary.

43 Syncrude argues that multiples of column amounts are the exception, not the rule. It points to the decision of this Court in *Shefsky v. California Gold Mining Inc.*, 2015 ABQB 525 (Alta. Q.B.) at para 21, 2015 CarswellAlta 1857 (Alta. Q.B.) ("*Shefsky*"). There the Court declined to find that costs on the basis of any multiple were warranted: *Shefsky* at paras 27-28.

44 Syncrude argues that the procedural matrix in *Shefsky* was analogous to that before me. I agree with Syncrude in that regard, though it is difficult to confidently assess the degree of complexity which actually confronted another Justice of this Court by simply reading their reasons for judgment.

45 I ultimately arrive at my costs award without significant reliance on the application of Schedule C to AMI's draft Bill of Costs, other than comparing the two to ensure that the draft Bill of Costs did not purport to reflect steps which could not responsibly have been taken. Accordingly, it is unnecessary for me to decide if a multiplier is appropriate in these circumstances. I would note, however, that were I not to adopt a percentage of fees incurred approach, I would consider it necessary to use a multiplier in respect of column 5 amounts.

Inflation Factor

46 AMI argues that I should apply an inflation factor of 40.64 per cent to any costs award. This, it argues, has been common practice in Alberta courts.

47 It states that the 40.64 percent rate represents the Bank of Canada rate to account for inflation between 1998 and 2017, being the last time Schedule C was revised.

48 I note Justice Kenny's decision in *Chisholm v. Lindsay*, 2013 ABQB 589 (Alta. Q.B.) ("*Chisholm*"). Quoting from her decision at para 29:

> It is up to the legislators to determine an appropriate Schedule C and to revise it as required from time to time. It is not up to the courts to undertake that analysis on a case by case basis.

49 Schedule C is the product of legislation. It is not "judge made". An argument can be made that if dollar values set forth in Schedule C are out of date, it falls to those responsible for implementing legislation which enacts amendments to the *Rules* and its Schedules to determine appropriate standards.

50 AMI directs my attention to the decision of our Court of Appeal in *RVB Managements Ltd. v. Rocky Mountain House (Town)*, 2015 ABCA 304 (Alta. C.A.) ("*RVB*"). There, the Court of Appeal speaks to its review of Justice Kenny's decision in *Chisholm*.

51 At paragraph 9 of *RVB* the Court comments:

> Chisolm does not stand for the proposition that Schedule C must or must not be adjusted for inflation. It merely confirms at para. 49 that trial judges have a wide discretion over costs, and that the costs award in that case (considered globally) did not contain any error warranting appellate interference.

52 Indeed, at paragraph 8 of *RVB*, the Court also notes:

> The re-enactment of the Rules continued the historically wide discretion of trial judges to award costs, and was made against the background of numerous judicial decisions that had been adjusting Schedule C for inflation. The re-enactment should be interpreted on the assumption that, where appropriate, that practice could continue.

53 The Court concluded on this topic at para 11:

> It was not an error in principle for the trial judge to adjust the costs for inflation, and that aspect of the award does not reflect any other reviewable error.

54 Concerns with the propriety of applying an inflationary component to a costs award were summarized in *Cogent Group Inc. v. EnCana Leasehold Limited Partnership*, 2014 ABQB 593 (Alta. Q.B.) at para 35, (2014), 597 A.R. 178 (Alta. Q.B.):

> To expect the courts, on a case by case basis, to adjust Schedule C amounts for "inflation", absent:
>
> (a) evidence of the effects of inflation on legal costs (as opposed to other goods and services);
>
> (b) evidence of the effects of inflation on legal costs incurred in civil litigation matters such as this matter (as opposed to its impact on fees charged for other services, such as mergers and acquisitions, tax, family or wills and estates matters); and
>
> (c) expert evidence on the selection of an appropriate indice or guideline, reflective of cost increases in the particular geographic region where the parties live or work (as opposed to what might be the appropriate indice or guideline in another part of the country and assuming the Court has some rational basis for selecting a particular region which it thinks accurately reflects the parties' cost of living or, in the case of a corporation such as EnCana, it costs of capital),

is to set the stage for potentially significantly different results, from different courts within the same jurisdiction in respect of substantially similar matters. I have difficulty understanding how that exercise would promote equal access to justice and its fair and consistent delivery.

55 To my knowledge, those views were not challenged on appellate review. AMI has not provided me with sufficient evidence that would address items (a), (b) and (c) above.

56 Syncrude argues that inflation should only be applied to Schedule C amounts where it is warranted by special circumstances, such as the effluxion of time or where legal fees were paid at a higher dollar value.

57 It asserts that no extraordinary circumstances exist here. It believes that Schedule C itself represents a reasonable apportionment of the litigation expenses incurred by AMI.

58 Again, by adopting an approach based on percentage of fees incurred, I avoid the need to consider inflation in respect of Schedule C amounts. For reasons noted below, I believe that inflation is accounted for in that approach.

Percentage of Fees Incurred

59 That is not to say that AMI is not entitled to enhanced costs, if "enhancements" are to be viewed with reference to amounts otherwise prescribed in Schedule C. It just strikes me as contortionist to apply both a multiple of Schedule C column amounts and an inflation factor, when the object is to arrive at a figure which provides 40% to 50% indemnification.

60 Why not simply approach the matter that way and avoid reverse engineering once the number has been arrived at in order to justify it on the basis of inflation and/or multiples? Inflation, as it would have otherwise applied to amounts prescribed in schedule C, is presumably already accounted for in the actual fees charged to AMI by its counsel.

61 It is, of course, necessary to have limited reference to Schedule C in order to perform a reality check. AMI claims that its lawyers have performed certain tasks and its draft Bill of Costs refers generally to the individual line items comprising work done. It claims to have spent $199,604.00 in securing those legal services.

62 Applying individual line item amounts from a particular column in Schedule C may make sense in a simpler situation. But here, the individual line items in Schedule C likely bear very little relation to the amount of effort actually required of AMI to respond to Syncrude's application.

63 Simply put, the nuances involved in cross examination or appearance at a contested application in this matter will differ from those involved in another matter. Schedule C amounts in respect of particular line items do not account for those differences.

64 Because of the differences inherent in most litigation undertakings, attempting to fairly account for these differences by resorting to a higher column based on a larger amount of money in issue is, to some extent, a contrivance and likely, a poor approximation of the value of work performed. It is therefore, a poor approximation of the financial consequences which the losing party should have to bear by way of partial indemnification of the successful party.

65 Of course, these shortcomings are recognized by all. The need to make artificial and arbitrary adjustments to Schedule C amounts (which have not been adjusted in twenty years) largely disappears in a situation such as this, where the parties are sophisticated, capable of engaging competent counsel of their choice and costs are awarded on the basis of 40% to 50% indemnification for actual legal fees incurred.

66 Some adjustment might be warranted if a parties' conduct was particular egregious.

67 However, it is unnecessary to adjust for:

1. the complexity of the matters in issue;
2. a compressed time frame;
3. the number of deponents to be examined;
4. the volume of material to review: or
5. inflation,

as these matters will undoubtedly have been reflected in the aggregate fees charged by AMI's counsel.

68 Having regard to the factors enumerated in *Rule* 10.33, I am satisfied that ordering Syncrude to pay a percentage of AMI's reasonable legal fees incurred to defend the application is an appropriate way to determine AMI's reasonable and proper costs in this case. I do so without reference to dollar amounts in Schedule C, as *Rule* 10.31(3)(a) permits me to do

when making a costs award under *Rule* 10.31(1)(a).

69 Further, to argue that a global indemnity should be raised from 40% to 50% to 50% to 60% because Syncrude's counterclaim far exceeded AMI's original claim or because, had I found favor with Syncrude's arguments and granted the relief it sought AMI may have had to cease operations, is tantamount to arguing that:

1. Syncrude should have arrived at the quantum of its counterclaim not by assessing the extent of its financial loss allegedly at the hands of AMI, but rather on the basis of its potential financial loss at the hands of the Court, should it incur an adverse costs award; and

2. Syncrude is under some obligation to formulate its litigation strategy with reference to AMI's potential prospects for long term survival.

These two propositions are inconsistent with our adversarial system of justice and are unsupported by the case law. I therefore decline to grant AMI costs on the basis of 50% to 60% of its reasonable legal fees. I would instead award costs on the basis of 45% of AMI's reasonable legal fees.

Should costs be payable forthwith

70 AMI notes that *Rule* 10.29(1) provides that a successful party is entitled to costs forthwith. The burden is on the losing party to justify why the court should exercise discretion to allow payment of costs in the cause: *Enviro Trace Ltd. v. Sheichuk*, 2015 ABQB 28 (Alta. Q.B.) at para 7, (2015), 25 Alta. L.R. (6th) 193 (Alta. Q.B.).

71 Syncrude argues that costs in the cause are fair where one party (Syncrude) seeks an interlocutory step as necessitated by the suit itself, and neither party was guilty of misconduct in taking such a step.

72 Further, Syncrude argues that where the result of an interlocutory application may be viewed differently following the determination at trial, the party who made the application should not be burdened with the penalty of costs in the interim: *Johannesen, Re*, 2002 ABQB 946 (Alta. Q.B.) at para 3, (2002), 6 Alta. L.R. (4th) 304 (Alta. Q.B.). It argues that where issues raised in the application overlap with the trial issues and the effect of the injunction remains reversible, it is inappropriate to require costs to be payable forthwith: *Stonewater Group of Restaurants Inc. v. Mikes Restaurants Inc.*, 2005 ABQB 964 (Alta. Q.B.) at paras 5-6, 2005 CarswellAlta 1906 (Alta. Q.B.).

73 Syncrude argues that the issues raised in its Application overlap with the issues raised in this Action. Syncrude posits that it would be unfair to require Syncrude to pay costs forthwith, given that the decisions I made in response to Syncrude's Application may be reversed at trial. That, of course, assumes the matter actually goes to trial and that the parties do not, based on the analysis that formed the basis for my decision regarding Syncrude's Application, arrive at a settlement.

74 Failing a direction that costs should follow the cause, Syncrude requests that costs associated with its Application before me be payable at the conclusion of the Action: *566320 Alberta Ltd. v. Lethbridge (City)*, 2005 ABCA 244 (Alta. C.A.) at para 10.

Decision on Payment of Costs

75 Syncrude has not justified departure from the rule that costs should ordinarily be paid forthwith. AMI was required to respond to a serious challenge to its activities.

76 Syncrude's challenge required AMI to devote considerable resources to defending its position. AMI's efforts in that regard proved to be successful.

77 It would be unfair to AMI to deny it access to the default rule. There would appear to be a disparity in financial resources available to the two parties to the Application before me. In such situations, failure to award costs forthwith would, in my view, invite misuse of the prejudgment relief process. A party with greater financial resources might be motivated to

misuse that process in an attempt to render the other party incapable of continuing with the litigation.

78 Costs are a necessary consequence of a decision to initiate legal proceedings. Syncrude must face those consequences.

79 AMI shall have its cost paid forthwith.

80 With respect to disbursements, I agree with Syncrude that it would not be appropriate to award out-of-town counsel's expenses, based on the reasoning in *Hansraj v. Ao*, 2002 ABQB 772 (Alta. Q.B.) at paras 14-15, [2002] 11 W.W.R. 688 (Alta. Q.B.).

81 In the result, I award costs in favor of AMI in the amount of $89,821.00 representing fees calculated as 45% of legal costs AMI asserts were actually incurred. I note in passing that this amount is reasonably close to the amount reflected by AMI in its draft Bill of Costs in respect of fees.

82 Disbursements and other charges are awarded as set forth in AMI's proposed Bill of Costs, with the exception of out of town counsel's expenses.

Order accordingly.

TAB 12

2005 ABQB 134
Alberta Court of Queen's Bench

Murphy Oil Canada Ltd. v. Predator Corp.

2005 CarswellAlta 806, 2005 ABQB 134, [2005] A.W.L.D. 2835, [2005] A.W.L.D. 2916, [2005] A.W.L.D. 2917, [2005] A.W.L.D. 2918, [2005] A.J. No. 721, 138 A.C.W.S. (3d) 28, 379 A.R. 388

Murphy Oil Canada Ltd., Apache Canada Ltd. and Murphy Canada Exploration Ltd. (Plaintiffs) and The Predator Corporation Ltd., Ricks Nova Scotia Co., and Predator Energies Partnership, Blair Longdo, Robert V. Shields and Gerry OReilly (Defendants)

The Predator Corporation Ltd., Blair Longdo,Robert V. Shields and Gerry OReilly (Plaintiffs by Counterclaim) and Murphy Oil Company Ltd., Apache Canada Ltd. and Murphy Canada Exploration Ltd., Harvey Doerr and Floyd Price (Defendants by Counterclaim)

McMahon J.

Heard: December 8, 2004
Judgment: March 2, 2005
Docket: Calgary 0001-19360

Counsel: Mr. J.J. Marshall, Q.C., Mr. R.F. Smith for Murphy Oil Company Limited, Murphy Canada Exploration Ltd., Harvey Doerr
Mr. D.J. Cichy, Mr. K.R. Anderson for Apache Canada Ltd., Floyd Price
Mr. R.A. Coad, Q.C., Mr. J.J. Patterson for Predator Corporation Ltd., Blair Longdo, Robert V. Shields, Gerry O'Reilly

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.c Counsel fee

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.d Disbursements
XXIV.9.d.vii Travelling expenses

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.d Disbursements
XXIV.9.d.ix Miscellaneous

Headnote

Civil practice and procedure --- Costs — Particular items of costs — Counsel fee
Plaintiffs sought costs in relation to summary judgment application wherein counterclaims totalling $3.242 billion were dismissed, leaving claims in approximate amount of $363 million — Claims in main action amounted to $30 million — Costs were awarded on party and party basis with reference to Schedule "C" — Fifty per cent was accurate approximation of apportionment between dismissed portions of counterclaim and surviving claims in main claim and in counterclaim — Lump sum award guided by 50 per cent of 6 times column 5 was appropriate — In result, plaintiff M was awarded lump sum costs of $633,000 — Plaintiff A was awarded lump sum costs of $500,250.

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Miscellaneous disbursements
Plaintiffs sought costs in relation to summary judgment application wherein counterclaims totalling $3.242 billion were dismissed, leaving claims approximate amount of $363 million — Claims in main action amounted to $30 million — Defendant P objected to plaintiffs' claims for costs for electronic research as disbursement — Plaintiffs' claim was in relation to copying, imaging, and converting paper records into electronic form — Weight of authority in province was that electronic research costs were not an allowable disbursement because they were contemplated under fees portion of Schedule C — Given number of documents exchanged, document imaging was prudent and undoubtedly saved parties time and money — Litigants should be encouraged to take steps that will reduce trial time greatly and cost recovery serves as such encouragement — Electronic research costs were reasonable in preparing for trial of this magnitude.

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Travelling expenses
Plaintiffs sought costs in relation to summary judgment application wherein counterclaims totalling $3.242 billion were dismissed, leaving claims approximate amount of $363 million — Claims in main action totalled $30 million — Travel expenses submitted as disbursements were been broken down in relation to purpose of travel — Plaintiff A's only evidence was that travel was related to meetings between its Calgary counsel and its corporate and US counsel and to depositions — In principle, travel expenses incurred in attending at discoveries is allowable — Travel expenses are not allowable where counsel attended upon their clients for purposes of seeking instructions — No evidence presented regarding what was done by outside law firms or in-house counsel — Great care must be taken in order to ensure that there is no duplication of costs between tariff and those allowed as disbursements — In light of lack of evidence, court declined to make separate award of costs for outside or in-house counsel.

Table of Authorities

Cases considered by *McMahon J.*:

Canada Deposit Insurance Corp. v. Canadian Commercial Bank (1987), 50 Alta. L.R. (2d) 1, [1987] 3 W.W.R. 160, 64 C.B.R. (N.S.) 9, 76 A.R. 271, 1987 CarswellAlta 314 (Alta. Q.B.) — referred to

Canada Deposit Insurance Corp. v. Prisco (1998), 1998 CarswellAlta 248, 221 A.R. 44, 1998 ABQB 163 (Alta. Q.B.) — referred to

Kha v. Salhab (2001), 2001 ABQB 44, 2001 CarswellAlta 53, 282 A.R. 324, 11 C.P.C. (5th) 150 (Alta. Q.B.) — referred to

Leadbeater v. DCS Systems Ltd. (2004), 2004 ABQB 622, 2004 CarswellAlta 1117 (Alta. Master) — referred to

LSI Logic Corp. of Canada Inc. v. Logani (2001), 2001 ABQB 968, 2001 CarswellAlta 1733, [2002] 4 W.W.R. 531, 100 Alta. L.R. (3d) 49 (Alta. Q.B.) — followed

Moser v. Derksen (2002), 2002 ABQB 679, 2002 CarswellAlta 891, [2002] 11 W.W.R. 305, 6 Alta. L.R. (4th) 107, 30 M.V.R. (4th) 12, 321 A.R. 56 (Alta. Q.B.) — referred to

Mullen v. Lockhart Motor Sales (Collingwood) Ltd. (1998), 1998 CarswellOnt 3845, 31 C.P.C. (4th) 287 (Ont. Gen. Div.) — referred to

Pauli v. ACE INA Insurance (2003), 15 Alta. L.R. (4th) 286, [2003] 11 W.W.R. 74, 4 C.C.L.I. (4th) 204, 40 C.P.C. (5th) 317, 2003 ABQB 600, 2003 CarswellAlta 1007, 336 A.R. 85 (Alta. Q.B.) — referred to

Pauli v. ACE INA Insurance (2004), 2004 ABCA 253, 2004 CarswellAlta 1018, 32 Alta. L.R. (4th) 205, [2005] 1 W.W.R. 12, (sub nom. *Pauli v. ACE INA Insurance Co.)* 354 A.R. 348, (sub nom. *Pauli v. ACE INA Insurance Co.)* 329 W.A.C. 348, 49 C.P.C. (5th) 47, 12 C.C.L.I. (4th) 215, [2004] I.L.R. I-4328, 242 D.L.R. (4th) 420 (Alta. C.A.) — referred to

Pharand Ski Corp. v. Alberta (1991), 37 C.P.R. (3d) 532, [1992] 1 W.W.R. 501, 83 Alta. L.R. (2d) 152, 122 A.R. 395, 5 B.L.R. (2d) 53n, 1991 CarswellAlta 184 (Alta. Q.B.) — referred to

S. (J.) v. Clement (1995), 1995 CarswellOnt 2962 (Ont. Gen. Div.) — referred to

Sidorsky v. CFCN Communications Ltd. (1998), 1998 CarswellAlta 325, 216 A.R. 151, 175 W.A.C. 151, 26 C.P.C. (4th) 374 (Alta. C.A.) — considered

Trizec Equities Ltd. v. Ellis-Don Management Services Ltd. (1999), 251 A.R. 101, 1999 ABQB 801, 1999 CarswellAlta 1469 (Alta. Q.B.) — considered

Westline Oilfield Construction Ltd. v. Petromet Resources Ltd. (2002), 2002 ABQB 934, 2002 CarswellAlta 1340, 324 A.R. 339 (Alta. Q.B.) — referred to

369413 Alberta Ltd. v. Pocklington (2000), 2000 CarswellAlta 327, 79 Alta. L.R. (3d) 222, 17 C.B.R. (4th) 305 (Alta. Q.B.) — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs — referred to

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *Murphy Oil Canada Ltd. v. Predator Corp.* (2005), 2005 ABQB 248, 2005 CarswellAlta 481 (Alta. Q.B.), with respect to costs.

***McMahon J.*:**

I. Introduction

1 This is an application by the Plaintiffs to set costs in relation to a summary judgment application wherein counterclaims totalling $3.242 billion were dismissed, leaving claims in the approximate amount of $363 million. The claims in the main action total $30 million.

2 Murphy and Apache initially sought full indemnity costs on the summary judgment motion, alleging positive misconduct on Predator's part. I ruled that there was no evidence of any misconduct sufficient to warrant solicitor client costs and that costs would be awarded on a party and party basis with reference to Schedule "C" or some multiple thereof. Quantification of those costs is now in issue. In this litigation there have been lengthy examinations for discovery and extensive document production. There have been 13 contested motions and almost four years of case management.

II. Positions of the Parties

1. Murphy and Apache

3 The total legal costs are as follows:

Murphy's Costs:	
Canadian Counsel	$3.60 million
American Counsel	$0.144 million

Logani (2001), [2002] 4 W.W.R. 531 (Alta. Q.B.) as a similar case, wherein portions of a statement of claim were struck, and costs and disbursements were awarded. They also point out that two of the parties named as defendants to the counterclaim, Price and Doerr, have been completely removed from the litigation as a result of the summary judgment application and will not have the opportunity to address the trial judge in relation to costs.

2. Predator

12 Predator submits that Apache and Murphy have not satisfied the onus on them to establish the necessity and reasonableness of the costs incurred. It also argues that Murphy and Apache have not made a sufficient effort to apportion the costs between the portion of the counterclaim that was dismissed and that which survived. It notes in this regard that its own review of the examinations for discovery transcripts revealed that 1,899 pages out of 8,936 (or 21%) related to the dismissed claims. Predator claims that its apportionment in this regard is the most accurate as it was the only review taken which included a consideration of claims for breaches of non-particularized operatorship duties which survived the summary judgment application.

13 Accordingly, Predator urges the Court to award Apache and Murphy only the costs of the application that they can prove, as opposed to the costs of the dismissed portions of the action to date, and to direct that all remaining costs issues be dealt with by the trial judge, as was done in *369413 Alberta Ltd. v. Pocklington* (2000), 79 Alta. L.R. (3d) 222 (Alta. Q.B.); and *Canada Deposit Insurance Corp. v. Prisco*, 221 A.R. 44, 1998 ABQB 163 (Alta. Q.B.). Predator states that once the litigation is completely over, Murphy and Apache will be able to disclose their solicitor client accounts and supporting documentation in an effort to prove their costs claims. Predator argues further that awarding substantial costs against it now, with the balance of the counterclaim outstanding, could cause it to suffer prejudice.

14 Alternatively, Predator submits that the appropriate measure of costs is Column 5 with no multiple. It argues that, although the amount of the counterclaim favours a multiple, the fact that this matter was determined on a summary judgment application as opposed to a long trial, negates that factor.

15 Predator submits that determining costs on the basis of a percentage of indemnity is not appropriate in this case and argues that *Trizec*, which Murphy and Apache rely on as authority for this approach, is restricted to applications in very long trials. It also points out that the approach in *Trizec* was to award a percentage of appropriate solicitor-client costs, not indemnity costs.

16 In any event, Predator submits that the costs that are awarded should be paid from the $500,000 currently posted as security to the credit of the counterclaim.

III. Analysis

1. Fees

17 The difficulty that arises on this application is sorting out the costs that attach to the counterclaim and those that relate to the main action, as well as those costs that were incurred in relation to the dismissed as opposed to the surviving claims in the counterclaim. The apportionment between the various claims cannot be precise as the work done and disbursements incurred cannot be neatly compartmentalized into the various categories. It would be unreasonable and impractical in terms of time and expense to separate the costs in this manner as has been suggested by Predator.

18 In *Trizec*, Mason J., in the context of a long trial, declined to make an award on the basis of Schedule C. Instead, he applied a percentage of indemnification to an appropriate assessment of solicitor client costs. At para. 26 he found:

> . . . 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.

19 This approach was also taken by Fruman J. (as she then was) in *L.S.I. Logic* where she awarded the Plaintiff corporation 2/3, and its officers and directors 1/3, of their respective solicitor client costs.

20 The logic of *Trizec* is appealing, however, its application in the circumstances of this case is problematic as it begins with the assumption that the solicitor client bills submitted by Murphy and Apache are acceptable, which is not conceded by Predator. In other words, the argument before me was tied to the costs that were spent, rather than the costs that have been determined to be reasonable.

21 It is also true that attempting to apportion between the main claim and the counterclaim, and between the struck and the surviving portions of the counterclaim, crates the same difficulty whether the costs are based upon Schedule C or on solicitor client fees.

22 In an earlier case management meeting, I directed that:

> There is not the kind of misconduct here that warrants a departure from Schedule C. The issues ... are whether there should be a multiple of column [5] and if so what multiple, given the usual factors.

23 In *LSI Logic* Fruman J. found, at para 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.

I adopt the same procedure here.

24 I accept that 50% is an accurate approximation of the apportionment between the dismissed portions of the counterclaim and the surviving claims in the main claim and in the counterclaim. That is evidenced by the similarity in the results achieved by the independent analyses undertaken by Murphy and Apache. Predator's result following its analysis, that only 21% of the discovery transcripts related to the dismissed claims, is attributable to the fact that its analysis was not confined to the specific claims that survived the summary judgment application, namely paragraphs 30 (a) to (d).

25 The fees claimed by Murphy in its draft Bill of Costs, based on single column 5, are $248,500. Fifty percent of Murphy actual fees (excluding U.S. counsel, fees incurred prior to the counterclaim and in a previous application before Wilkins J.) amount to $1.55 million. The fees portion of Apache's Draft Bill of Costs on single column 5 amount to $254,500. Half of Apache's actual, lead counsel fees is $1.5235 million. In both cases the fees portion of the draft Bills of Costs based on single column 5 reflect a rate of indemnity of less than 20%.

26 I find that an award reflecting a multiple of party and party costs is appropriate here. Party and party costs are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to a number of factors, including the conduct of the parties, the length of the trial and the complexity of the issues: *Pharand Ski Corp. v. Alberta* (1991), 122 A.R. 395 (Alta. Q.B.).

27 The claims in the counterclaim were for an unprecedented amount, initially $6 billion later amended down to $3.6 billion. Additionally, although most of these claims were dismissed in a summary fashion rather than following a long trial, it was in the course of lengthy and complex case management. To date case management has been proceeding for almost 4 years and the bulk of the discoveries and other preparation for trial has been completed. As was determined in *LSI Logic*, at para. 9: "[t]he time of the actual hearing is not a proper gauge of the complexity of the issues."

28 Having regard to the circumstances enumerated above, I conclude that a lump sum award guided by 50% of 6 times column 5, is appropriate. In arriving at the lump sum award, I have taken into account the number of days the plaintiffs' counsel attended discoveries only as observers. I have also excluded from my consideration the costs claimed in relation to the contested motions, except the summary judgment application. The costs for the contested motions are better left to the

TAB 13

2009 ABCA 20
Alberta Court of Appeal

Polar Ice Express Inc. v. Arctic Glacier Inc.

2009 CarswellAlta 25, 2009 ABCA 20, [2009] A.W.L.D. 571, [2009] A.W.L.D. 586, [2009] A.W.L.D. 694, [2009] A.W.L.D. 695, [2009] A.W.L.D. 700, [2009] A.W.L.D. 701, [2009] A.W.L.D. 702, [2009] A.W.L.D. 703, 173 A.C.W.S. (3d) 1096, 442 W.A.C. 295, 446 A.R. 295, 99 Alta. L.R. (4th) 203

Polar Ice Express Inc. (Respondent / Plaintiff) and Arctic Glacier Inc. (Appellant / Defendant)

J. Côté, M. Paperny, F. Slatter JJ.A.

Heard: January 8, 2009
Judgment: January 13, 2009
Docket: Edmonton Appeal 0803-0106-AC

Proceedings: affirming *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2007), [2007] A.J. No. 1349, 2007 ABQB 717, 2007 CarswellAlta 1647, 434 A.R. 261, 83 Alta. L.R. (4th) 299, R.P. Marceau J. (Alta. Q.B.); additional reasons at *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2008), 89 Alta. L.R. (4th) 148, 2008 CarswellAlta 371, 2008 ABQB 194, R.P. Marceau J. (Alta. Q.B.); and varying *Polar Ice Express Inc. v. Arctic Glacier Inc.* (2008), 89 Alta. L.R. (4th) 148, 2008 CarswellAlta 371, 2008 ABQB 194, R.P. Marceau J. (Alta. Q.B.)

Counsel: P.D. Kirwin for Respondent / Plaintiff
J.G. Shea, J.W. Moroz for Appellant / Defendant

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

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
  XXIV.7 Particular orders as to costs
    XXIV.7.e Costs on solicitor and client basis
      XXIV.7.e.ii Grounds for awarding
        XXIV.7.e.ii.G Miscellaneous

Commercial law
VI Trade and commerce
  VI.5 Competition and combines legislation
    VI.5.c Competition offences and reviewable practices
      VI.5.c.iii Illegal pricing practices
        VI.5.c.iii.B Miscellaneous

Remedies
I Damages
  I.12 Exemplary, punitive and aggravated damages
    I.12.k Miscellaneous

Remedies
I Damages
  I.15 Practice and procedure

I.15.e Evidence
I.15.e.ii Proof of loss in specific cases
I.15.e.ii.B Tort

Torts
IX Inducing breach of contract
IX.1 Elements of tort

Torts
XI Interference with economic relations
XI.1 Elements of tort
XI.1.c Actual interference or causation

Torts
XI Interference with economic relations
XI.1 Elements of tort
XI.1.e Use of unlawful means

Headnote

Torts --- Interference with economic relations — Elements of tort — Use of unlawful means
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations was allowed — Trial judge found that defendant used threats and bribery to get customers to stop doing business with plaintiff, and so resume being sole ice supplier to many customers in region — Appeal by defendant dismissed — Defendant claimed that evidence was insufficient to support trial judge's fact findings and factual inferences, including whether bribes and threats were used and whether they were effective — Defence counsel founded his legal arguments on several propositions of fact which were expressly rejected by trial judge — Usual standard of review on appeal does allow reweighing of evidence for questions of fact or mixed law and fact — Submission that trial judge should have drawn adverse inference from failure of certain people to testify was rejected, as they were not connected with plaintiff but with defendant — Trial judge was well aware of all elements of tort — If one accepted his fact findings and inferences, all those elements were established — There was no error of law on merits.

Torts --- Interference with economic relations — Elements of tort — Actual interference or causation
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations was allowed — Trial judge found that defendant used threats and bribery to get customers to stop doing business with plaintiff, and so resume being sole ice supplier to many customers in region — Appeal by defendant dismissed — Defendant claimed that evidence was insufficient to support trial judge's fact findings and factual inferences, including whether bribes and threats were used and whether plaintiff's loss of business was coincidence — Defence counsel founded his legal arguments on several propositions of fact which were expressly rejected by trial judge — Usual standard of review on appeal does allow reweighing of evidence for questions of fact or mixed law and fact — Submission that trial judge should have drawn adverse inference from failure of certain people to testify was rejected, as they were not connected with plaintiff but with defendant — Trial judge was well aware of all elements of tort — If one accepted his fact findings and inferences, all those elements were established — There was no error of law on merits.

Torts --- Inducing breach of contract — Elements of tort
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its

contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for inducing breach of contract was allowed — Trial judge found that defendant used threats and bribery to get customers to stop doing business with plaintiff, and so resume being sole ice supplier to many customers in region — Appeal by defendant dismissed — Defendant claimed that evidence was insufficient to support trial judge's fact findings and factual inferences, including whether bribes and threats were used and whether plaintiff's loss of business was coincidence — Defence counsel founded his legal arguments on several propositions of fact which were expressly rejected by trial judge — Usual standard of review on appeal does allow reweighing of evidence for questions of fact or mixed law and fact — Submission that trial judge should have drawn adverse inference from failure of certain people to testify was rejected, as they were not connected with plaintiff but with defendant — Trial judge was well aware of all elements of tort — If one accepted his fact findings and inferences, all those elements were established — There was no error of law on merits.

Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Illegal pricing practices — Miscellaneous issues
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations and inducing breach of contract was allowed — Plaintiff was awarded damages of $50,000 "at large" — Appeal by defendant dismissed — Trial judge relied in part on s. 50(1) of Competition Act to make out extra head of illegal means — Defendant raised defence of lowering one's price to meet lower prices of competitor — Question of whether that excused prices which were lowered only for customers to whom competitor had offered lower prices, or whether drop in prices must be general, would not be decided on record — While defendant did significant harm to plaintiff's ice business, s. 50(1) of Act applied only to sales of small bags of "party ice" to liquor and convenience stores, and had nothing to do with destruction of bigger part of plaintiff's business which was supplying ice to cement companies — It was impossible on evidentiary record precisely to quantify loss of gross revenue from torts, let alone lost net profit — Trying to decide precise limits of legal defence of meeting lower competitors' prices under s. 50(1) would be pointless.

Remedies --- Damages — Practice — Evidence — Proof of loss in specific cases — Tort — Miscellaneous
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations and inducing breach of contract was allowed — Plaintiff was awarded damages of $50,000 "at large" — Appeal by defendant dismissed — While defendant did significant harm to plaintiff's ice business, s. 50(1) of Act applied only to sales of small bags of "party ice" to liquor and convenience stores, and had nothing to do with destruction of bigger part of plaintiff's business which was supplying ice to cement companies — It was impossible on evidentiary record precisely to quantify loss of gross revenue from torts, let alone lost net profit, and to simply reduce damages to remove "party ice" business — Trial judge properly awarded $50,000 damages "at large" — Difference in net profits which "party ice" business would make would be small enough to be within margin of error of calculation of $50,000 damages at large — Trying to decide precise limits of legal defence of meeting lower competitors' prices under s. 50(1) would be pointless.

Remedies --- Damages — Exemplary, punitive and aggravated damages — General principles
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations and inducing breach of contract was allowed — Trial judge found that defendant used threats and bribery to get customers to stop doing business with plaintiff, and so resume being sole ice supplier to many customers in region — Plaintiff was awarded damages of $50,000 "at large" — Defendant appealed and plaintiff filed notice of intention to vary seeking punitive damages

sought, but not awarded, at trial — Cross-appeal dismissed — Pleadings did not set out punitive damages in prayer for relief — Trial judge held that while defendant's egregious conduct would ordinarily call for punitive damages, it would be unfair to award punitive damages where defendant did not know case it had to meet — Defendant was entitled to more notice than it received of any sort of claim for non-compensatory damages — Up to certificate of readiness, there was no request to amend statement of claim, and no notice of such punitive damage claim was alleged — Decision to reject request for amendment at trial was reasonably open to trial judge.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General principles
Plaintiff, fledgling ice supplier, alleged that defendant, largest ice supplier in prairie provinces, unlawfully interfered with its contractual relations and commercial interests when defendant used bribes and threats to ensure exclusivity from I Ltd., third party to which plaintiff was also supplying ice for construction project — Plaintiff further alleged that defendant offered to supply ice at lower price only to those grocery stores and liquor stores that were plaintiff's current or prospective customers, in breach of s. 51 of Competition Act — Plaintiff's action for damages for wrongful interference with economic relations and inducing breach of contract was allowed — Plaintiff was awarded damages of $50,000 "at large" and costs on solicitor-client basis — Defendant appealed costs award — Appeal allowed — In awarding solicitor-client costs for defendant's bad pre-suit conduct, trial judge relied upon case that was diametrically opposed to that proposition — In general, solicitor-client costs for misconduct must relate to conduct during suit, not pre-suit conduct sued over — Reasons on substantive liability indicated that there was misconduct by defendant during suit and referred to improper denial of discovery of records on material point — In addition, trial judge clearly and properly found that defendant's employee and witness was lying under oath when he denied attempts to bribe employees of customers — That was serious misconduct which lengthened and made trial more difficult, and maybe impeded settlement — Plaintiff's costs reduced to party-party costs to end of day before trial, and allowed on solicitor-client basis thereafter.

Table of Authorities

Cases considered:

Entreprises Ludco ltée c. Canada (2001), 2001 SCC 62, (sub nom. *Ludco Enterprises Ltd. v. Minister of National Revenue)* 275 N.R. 90, (sub nom. *Ludco Enterprises Ltd. v. Canada)* 204 D.L.R. (4th) 590, 2001 CarswellNat 2017, 2001 CarswellNat 2018, (sub nom. *Ludco Enterprises Ltd. v. R.)* 2001 D.T.C. 5505 (Eng.), (sub nom. *Ludco Enterprises Ltd. v. R.)* 2001 D.T.C. 5518 (Fr.), [2002] 1 C.T.C. 95, (sub nom. *Ludco Enterprises Ltd. v. Canada)* [2001] 2 S.C.R. 1082 (S.C.C.) — considered

Jackson v. Trimac Industries Ltd. (1994), 1994 CarswellAlta 135, 20 Alta. L.R. (3d) 117, [1994] 8 W.W.R. 237, 155 A.R. 42, 73 W.A.C. 42 (Alta. C.A.) — considered

Professional Sign Crafters (1988) Ltd. v. Seitanidis (1998), 1998 CarswellAlta 874, 1998 ABCA 303 (Alta. C.A.) — referred to

Sidorsky v. CFCN Communications Ltd. (1997), [1998] 2 W.W.R. 89, 53 Alta. L.R. (3d) 255, 1997 CarswellAlta 772, 15 C.P.C. (4th) 174, 206 A.R. 382, 156 W.A.C. 382, 40 C.C.L.T. (2d) 94 (Alta. C.A.) — referred to

Sidorsky v. CFCN Communications Ltd. (1998), 216 A.R. 151, 175 W.A.C. 151, 1998 ABCA 127, 1998 CarswellAlta 325, 26 C.P.C. (4th) 374 (Alta. C.A.) — referred to

Tree Savers International Ltd. v. Savoy (1992), 84 Alta. L.R. (2d) 384, 39 C.C.E.L. 253, [1992] 2 W.W.R. 470, 40 C.P.R. (3d) 173, 87 D.L.R. (4th) 202, 120 A.R. 368, 8 W.A.C. 368, 1992 ABCA 2828, 1992 CarswellAlta 220 (Alta. C.A.) — referred to

Whiten v. Pilot Insurance Co. (2002), 156 O.A.C. 201, 35 C.C.L.I. (3d) 1, [2002] 1 S.C.R. 595, 2002 SCC 18, 2002 CarswellOnt 537, 2002 CarswellOnt 538, 283 N.R. 1, 20 B.L.R. (3d) 165, [2002] I.L.R. I-4048, 209 D.L.R. (4th) 257 (S.C.C.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R.

Canada or the Alberta Court of Appeal. Some are earlier.

22 Trusts or a fiduciary relationship might be an exception, but that is irrelevant here.

23 Was there misconduct by the appellant during the suit? The reasons on costs baldly recite that the reasons on the merits said "no". But the reasons on substantive liability in fact say "yes", and refer to improper denial of discovery of records on a material point, the business which the appellant got from the respondent's former customer or customers (paras. 68-72, 110). Counsel for the appellant tried to justify to us withholding that information on grounds of lack of relevance, but he himself attacked the lack of trial evidence on such topics. So it was very relevant.

24 In addition, the trial judge clearly and properly found that the appellant's employee and witness, Mr. Collier, was not telling the truth when he denied, on examination for discovery and at trial, attempts to bribe employees of customers. In other words, he was lying under oath.

25 In our view, that was serious misconduct which lengthened and made the trial more difficult, and maybe even necessitated the trial, if only because the misconduct impeded settlement. Some of the facts in *Jackson v. Trimac Industries Ltd.* (1994), 155 A.R. 42 (Alta. C.A.), 51 are similar.

26 The appellant was entitled to run a defence and to test the respondent's evidence by discovery, but it had a duty to give full and honest discovery. Had it done so, there would either have been a much shorter trial, or no trial. One cannot be precise and scientific in working out all the consequences of that misconduct, but a fair, simple and efficient remedy is as follows:

> (a) The respondent's costs in the Court of Queen's Bench up to the end of the day before trial will be reduced to party-party costs, the fees taxed on Schedule C, column 2;
>
> (b) The respondent's costs in the Court of Queen's Bench thereafter will be on a solicitor-client basis (i.e. full indemnity).

27 The appeal is allowed to that extent only. In all other respects, the trial judgment is affirmed.

28 Since the respondent has won all the issues on the main appeal save half of one, the respondent will receive all costs of this appeal, on a party-party basis, the fees taxed on column 2 of Schedule C. No one will receive costs of the Notice of Intention to Vary (which took little time), and the respondent's factum will be treated as all devoted to the main appeal.

Appeal allowed in part; cross-appeal dismissed.

End of Document

TAB 14

2004 BCSC 20
British Columbia Supreme Court

Jackpine Forest Products Ltd., Re

2004 CarswellBC 87, 2004 BCSC 20, [2004] B.C.W.L.D. 544, [2004] B.C.J. No. 91, 128 A.C.W.S. (3d) 492, 27 B.C.L.R. (4th) 332, 47 C.P.C. (5th) 313, 49 C.B.R. (4th) 110

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

In the Matter of The Company Act, R.S.B.C. 1996, c. 62

In the Matter of Jackpine Forest Products Ltd. and Jackpine Engineered Wood Products Inc. (Petitioners)

Burnyeat J.

Heard: November 28, 2003
Judgment: January 21, 2004
Docket: Vancouver L033141

Counsel: J.I. McLean, C.D. Brousson for Jackpine Forest Products Ltd., Jackpine Engineered Wood Products Inc.
C.M. Ritchie for GE Canada Equipment Financing G.P.
H.M.B. Ferris for Monitor, PricewaterhouseCoopers Inc.
C.M. Emslie for Bank of Montreal
G.J. Gehlen for Lignum Limited

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX **Companies' Creditors Arrangement Act**
XIX.2 Initial **application**
XIX.2.g Monitor

Civil practice and procedure
XXIV **Costs**
XXIV.7 Particular orders as to **costs**
XXIV.7.f **Costs** on solicitor and own client basis

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.d Quantum of costs
XXIV.8.d.iii Special **costs**

Headnote

Civil practice and procedure --- **Costs** — Scale and quantum of **costs** — Quantum of **costs** — Special **costs**
Secured creditor's **application** to substitute monitor appointed under **Companies' Creditors Arrangement Act** was dismissed — Debtor company applied for various **costs** orders — **Application** was granted in part — **Costs** in proceedings under Act are governed by inherent jurisdiction of court and Rules of Court, 1990 — Order for special **costs** was not appropriate — Conduct of applicant was not reprehensible or deserving of censure — **Application** was not brought for

improper purpose.

Civil practice and procedure --- **Costs** — Particular orders as to **costs** — **Costs** on solicitor and own client basis
Secured creditor's **application** to substitute monitor appointed under **Companies' Creditors Arrangement Act** was dismissed — Debtor company applied for various **costs** orders — **Application** was granted in part — **Costs** in proceedings under Act are governed by inherent jurisdiction of court and Rules of Court, 1990 — Rules did not contemplate order for solicitor-and-own-client **costs** on interlocutory **application** — Fixing of "lump sum **costs**" is limited to party-and-party **costs** — Legislature did not intend to remove right of interested party to require assessment of solicitor's bill.

Bankruptcy and insolvency --- Proposal — **Companies' Creditors Arrangement Act** — Miscellaneous issues
Secured creditor's **application** to substitute court appointed monitor was dismissed — Debtor company applied for various **costs** orders — **Application** was granted in part — **Costs** in proceedings under **Companies' Creditors Arrangement Act** are governed by inherent jurisdiction of court and Rules of Court, 1990 — Secured creditors who opposed **application** were entitled to fixed party-and-party **costs** — Only one set of **costs** was awarded given duplication of interests — Adding of creditors' solicitors' bills to amounts owing by debtor company was matter governed by security agreements between them — Court ordered that applicant pay company's bill after assessment — Purpose of Act would not be furthered if company's debt were increased by defending unmeritorious interlocutory **applications** — Monitor's **costs** were not recoverable under priority created by order of appointment — Monitor should not have taken part in **application** involving dispute between creditors — Monitor as impartial officer could not pursue own interest in defending appointment.

Table of Authorities

Cases considered by *Burnyeat J.*:

Canadian Imperial Bank of Commerce v. Cedar Hills Properties Ltd. (1997), 1997 CarswellBC 1557, (sub nom. *Canadian Imperial Bank of Commerce v. Sovereign Life Insurance Co.)* 150 W.A.C. 21, (sub nom. *Canadian Imperial Bank of Commerce v. Sovereign Life Insurance Co.)* 92 B.C.A.C. 21, 11 R.P.R. (3d) 292, 32 B.L.R. (2d) 277, 47 C.B.R. (3d) 153, 9 C.P.C. (4th) 180, 35 B.C.L.R. (3d) 1, [1997] 8 W.W.R. 26 (B.C. C.A.) — considered

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — followed

Eron Mortgage Corp., Re (1998), 1998 CarswellBC 102, 2 C.B.R. (4th) 184, 53 B.C.L.R. (3d) 24 (B.C. S.C.) — followed

Garcia v. Crestbrook Forest Industries Ltd. (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242, 14 C.C.E.L. (2d) 84, 41 C.P.C. (3d) 298, (sub nom. *Garcia v. Crestbrook Forest Industries Ltd. (No. 2))* 45 B.C.A.C. 222, (sub nom. *Garcia v. Crestbrook Forest Industries Ltd. (No. 2))* 72 W.A.C. 222, 1994 CarswellBC 1184 (B.C. C.A.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — considered

*Reference re **Companies' Creditors Arrangement Act** (Canada)* (1934), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) — considered

Siscoe & Savoie v. Royal Bank (1994), 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42, 1994 CarswellNB 14 (N.B. C.A.) — considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 ABQB 682, 2002 CarswellAlta 896, 35 C.B.R. (4th) 304, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152 (Alta. Q.B.) — considered

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R.

(2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Legal Profession Act, S.B.C. 1998, c. 9
Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

R. 57 — referred to

R. 57(1) — referred to

R. 57(13.1) [en. B.C. Reg. 83/2002] — considered

R. 57(13.1)(a) [en. B.C. Reg. 83/2002] — referred to

R. 57(13.1)(b) [en. B.C. Reg. 83/2002] — considered

R. 57(34) — considered

R. 57(35) — considered

App. B, s. 2(2)(b) — referred to

App. B, s. 2(2)(c) — referred to

Tariffs considered:

Rules of Court, 1990, B.C. Reg. 221/90
App. B — referred to

ADJUDICATION on costs.

***Burnyeat J.*:**

1 On November 28, 2003, GE Canada Equipment Financing G.P. ("GE") a secured creditor of Jackpine Forest Products Ltd. and Jackpine Engineered Wood Products Inc. ("Jackpine") applied to substitute a different firm in place of PricewaterhouseCoopers Inc. ("P.W.C.") who had been appointed as the Monitor in these ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("***C.C.A.A.***") proceedings on November 28, 2003.

2 Appearing to oppose that motion were counsel on behalf of Jackpine, the Monitor, and two secured creditors, Bank of Montreal ("BOM") and Lignum Limited ("Lignum")

3 The application to substitute the Monitor was dismissed without the necessity of hearing from the counsel who were opposing the **application** of GE. The questions which arise are whether **costs** should be available to the various parties who appeared to oppose the Motion of GE, what type of costs should be available, and whether any costs can be added to the

balances owing under the security which charges the property of Jackpine.

SUBMISSION OF THE PARTIES

4 Jackpine submits that GE should pay the **costs** of Jackpine, Lignum, BOM, and the Monitor for the respective counsel's preparation and attendance on the **application** of GE. Jackpine seeks these **costs** in the fixed amount of $18,400.00 payable forthwith and without setoff against debt owing by Jackpine to GE. Jackpine submits that this amount represents partial indemnity of the legal fees and disbursements incurred by Jackpine, Lignum, BOM and the Monitor which will otherwise be added to the indebtedness of Jackpine under the security held by Lignum and BOM or to the indebtedness of Jackpine arising out of the Order appointing the Monitor whereby the expenses of the Monitor were given a priority ranking ahead of the security held by Lignum, BOM and GE. Jackpine also submits that GE should not be allowed to add any of its costs to the indebtedness of Jackpine under the security held by GE.

5 Jackpine submits that the total of $18,400.00 is based upon estimates received from counsel and is made up as follows: Jackpine ($6,200), BOM ($6,200), Lignum ($3,000), and the Monitor ($3,000).

6 GE submits that there is no justification for an order for Special Costs or solicitor and own client **costs**, that the Court should only award Party and Party (Scale 2) **costs** because the **application** was of less than ordinary difficulty and that only Jackpine should be allowed its **costs** as no relief was being sought against Lignum and BOM, as the exiting Monitor is a Court appointed officer and should not have taken a position on the motion, and as only one set of **costs** should be awarded when several parties have the same interest in the outcome of an **application**. In particular, GE submits that the interests of BOM and Lignum were identical with the interests of Jackpine so there was no necessity for counsel on behalf of BOM and Lignum to make submissions in addition to those being made by counsel for Jackpine and, in any event, Lignum did not file any materials and planned to rely "essentially on submissions made by counsel for the Petitioners [Jackpine]".

APPLICABLE RULES AND STATUTORY PROVISIONS

7 Costs to be awarded in proceedings under the *C.C.A.A.* are governed under the inherent jurisdiction of the Court and the British Columbia *Rules of Court* as there are no applicable provisions within the *C.C.A.A.* dealing with this question of costs.

8 Rule 57(1) of the *Rules of Court* provides that, where costs are payable under the *Rules* or by order, costs will be assessed as Party and Party Costs under Appendix B unless the Court orders that they be assessed as Special Costs. Rule 57(13.1) of the *Rules of Court* provides:

> The court may award lump sum **costs** of an interlocutory **application** and may
>
> (a) fix those **costs**, either inclusive or exclusive of disbursements, or
>
> (b) order that the **costs** amount be in accordance with Schedule 3 of Appendix B and fix the scale of those costs in accordance with section 2(2) of that Appendix.

9 Appendix B of the *Rules of Court* deals with "Party and Party Costs" and not with Special Costs or a bill under the *Legal Profession Act*.

10 Rule 57(34) provides: "A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis. Rule 57(35) provides: "A lump sum bill shall contain a description of the nature of the services and of the matter involved as would, in the opinion of the Registrar, afford any solicitor sufficient information to advise a client on the reasonableness of the charge made."

ARE SPECIAL COSTS AVAILABLE?

and assumed that jurisdiction remained available except as inconsistent with the *Act*. (at p. 243)

In my opinion, an equitable jurisdiction is available to support the monitor which is sufficiently flexible to be adapted to the monitor's role under the **CCAA**. It is a time-honoured function of equity to adapt to new exigencies. (at p. 247)

33 Consistent with those decisions, is the decision in *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), where Lovecchio, J. dealt with the question of whether debtor in possession financing should rank in priority ahead of registered builders' liens and stated:

. . . numerous decisions in Canada had supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objectives of the **CCAA** (at p. 310).

34 If the purpose of the ***C.C.A.A.*** is to facilitate the making of an arrangement so that a company is able to continue in business, then that purpose is not accommodated by uncertainty regarding which monitor will not only monitor the efforts of the company but will also assist the company in its efforts to produce an acceptable arrangement. The purpose of the ***C.C.A.A.*** is also not facilitated by adding to the debt owing by the company occasioned by an unsuccessful application being made which has the effect of delaying the activities of the monitor and the company and which has the effect of adding to the balances owed by the company to its own legal advisors, the monitor appointed, or to the creditors of the company.

35 When an application is made to replace one monitor with another but the **application** is unsuccessful, it will not always follow that the **costs** associated with such an **application** should be borne by the party requesting the change. However, this **application** of GE was without merit. In those circumstances, the company should not bear the actual cost of defending such an **application**. Successfully defending an **application** is of little solace to a company if all of the **costs** of defending and all of the **costs** of the unsuccessful applicant are merely added to an already stifling debt load.

36 The Court is called upon to play a role of observing that the status quo is maintained. Such an application also changes the status quo by the addition of substantial amounts to the debt balances which will have to be paid or which will be the subject matter of the arrangement ultimately proposed. It will be impossible for the Court to maintain the status quo as Jackpine attempts to gain the approval of its creditors for any proposed arrangement if it is necessary for Jackpine to fund its solicitors to deal with applications which detract from rather than facilitate the process of preparing an arrangement.

37 Accordingly, using a broad and flexible exercise of the inherent jurisdiction available to me, I order that Jackpine recover from GE the amount of any bill that Jackpine receives under the *Legal Profession Act*, that the amount paid by GE not be added to the debt owing by Jackpine to GE, and that GE not be at liberty to add to the balance owing under its security any account relating to the November 28 **application** it receives from its solicitors pursuant to the *Legal Profession Act*.

38 If only Party and Party **costs** were available to Jackpine as is requested by GE, then it would only mean that a lesser amount of further debt would be added to what is already owing by Jackpine. The facilitation of the process of preparing an arrangement is best met if no further debt is added to the balance owing by Jackpine as a result of this application by GE.

39 At the same time, I am satisfied that GE should be at liberty to require the assessment of any bill that the solicitors for Jackpine render. It would be unfair to GE and other than in accordance with the *Legal Profession Act* to make an Order setting the amount payable by GE to Jackpine at $6,200.00 without requiring the solicitors for Jackpine to render a bill under the *Legal Profession Act* containing a description of the nature of the services and of the matter involved and without enabling GE to require an assessment of that bill before the Registrar of the Court.

40 GE is entitled to require the assessment of any bill under the *Legal Profession Act* rendered by the solicitors for Jackpine: *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.). While the Court concluded that such an assessment was available under the applicable legislation of that Province, Turnbull, J.A. on behalf of the Court also stated: "The Court also had an inherent jurisdiction to approve or disapprove of any account during the continuation of the **CCAA** Order" (at p. 8). The provisions of the *Legal Profession Act* and the inherent jurisdiction available to me allow the order that I make to be made against GE.

TAB 15

2012 QCCS 4787
Cour supérieure du Québec

9007-7876 Québec inc. (Steinberg Inc.), Re

2012 CarswellQue 10445, 2012 QCCS 4787, [2012] R.J.Q. 1953, 230 A.C.W.S. (3d) 27, J.E. 2012-2015, EYB 2012-212393

In the matter of the Arrangement of: 9007-7876 Québec inc. (formerly Steinberg Inc.), Debtor, v. Gaetan Laflamme, Petitioner, and Le sous-ministre du Revenu du Québec, Respondent, and Lorne Goldman et al, ès qualité, member of Le comité permanent des créanciers and Michel Côté, Mis en cause

Tingley J.C.S.

Heard: 20 june 2012
Judgment: 14 september 2012
Docket: C.S. Qué. Montréal 500-05-008364-927

Counsel: *Me Denis A. Lapierre*, for Petitioner and Creditors' Committee
Me Jean-Pierre Gaudette, for Respondent

Subject: Insolvency

Tingley J.S.C:

JUDGMENT (On a Motion for Adjudication of fees and disbursements on a solicitor/client basis)

THE ISSUE

1 The Monitor under a remodified plan of arrangement (Plan) submitted by Steinberg Inc., accepted by the majority of its creditors and sanctioned by the Court in 1993, and the Creditors' Committee, representing the class 3 unsecured creditors of Steinberg Inc., ask that the extra-judicial fees and disbursements ($64,000) the Monitor has paid out of funds (Litigation proceeds) belonging to and held *in trust* for the said unsecured creditors pursuant to the Plan, be reimbursed by Canada pursuant to the latter's' unsuccessful attempt, in effect, to seize before judgment the Litigation proceeds to assure the satisfaction of its assessment[1] of sales taxes against Steinberg Inc.[2]

2 Canada submits it should not have to pay such solicitor/client fees and disbursements as it has already paid the « costs » of its failed efforts to tie up the Litigation proceeds and there is thus « chose jugée » in respect of this issue.[3]

3 Should the Court conclude that the Monitor's request is akin to a special fee in virtue of article 15 of the Tariff,[4] Canada adds that the criteria for such a fee have not been met.[5]

THE CONTEXT

4 The Monitor's application follows from the judgment of this Court rendered on August 29, 2011 dismissing Canada's Motion to Revoke its earlier judgment of June 18, 2010 and to dismiss the Motion of the Monitor for Directions. The June 18, 2010 judgment provided that:

19) Canada has no direct claim whatsoever on any of the Proceeds held by the Monitor for the benefit of the class three creditors and it is now statute barred from asserting any such claim against them by an assessment. In the event that Steinberg Inc. is unsuccessful in its appeal of Canada's assessment and it then fails to pay the assessment, arguably, Canada might seek to bring an oblique or Paulian action to enforce whatever right Steinberg Inc. still has to recover from the Monitor what was paid by Provigo Inc. in excess of the "argents nets", if any.

20) At best, Canada can claim an eventual economic interest in the litigation portfolio, if all unfolds as posited above in paragraph [19]; all future and very uncertain events. This is not sufficient to permit it to set aside a declaratory judgment that orders nothing and merely opens the door to the payment of a dividend out of the Proceeds currently held by the Monitor for the benefit of the class three creditors.

21) There is ongoing litigation that could benefit the class three creditors. They have an exclusive interest as amongst the classes of creditors in the net proceeds from the litigation portfolio at least to the extent of another $3.5 million and a shared interest (50%) of all such proceeds in excess of $17.5 million.

5 *THE JUDGMENT SOUGHT TO BE REVOKED*

22) As noted above in paragraph [20], the judgment sought to be revoked is merely declaratory. The declaration is entirely consistent with previous pronouncements of the Court concerning the rights of the class three creditors in the Proceeds from the litigation portfolio; a portfolio that might yet receive further funds.

23) The class three creditors have waited a long time to realize upon a portion of what was offered to them by Steinberg Inc. in 1993 with the blessing of all the other creditors of the Debtor, particularly those who ranked in priority to them. This includes the "Couronne", both federal and provincial, who also were parties to the Plan.

24) Canada lacks the required interest at this time to interfere with the rights of the class three creditors to receive the Proceeds from the litigation portfolio pursuant to a transfer of such portfolio made in 1993 and realized, in part, in 2004. There may yet be more proceeds to come.

25) FOR THESE REASONS, THE COURT:

26) DISMISSES the Motion of the Petitioner to revoke a judgment at the request of a third party;

27) The Whole with **costs**.

6 Counsel to the Monitor taxed their **costs** in respect of the August 29, 2011 judgment on January 27, 2012 at $17,178. before the special clerk with the approval of Counsel for Canada. These **costs** included the 1% fee of article 42 of the Tariff ($15,119.) but do not include any special fee contemplated in article 15 of the Tariff.

7 The Court's authority to respond to the Monitor's application is found in Section 11 of the **Companies Creditors Arrangement Act (CCAA)**6 which provides that:

General Power of Court

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

7 *DISCUSSION*

7 *A. The Power to award **costs** under the **CCAA***

8 The power of the Court to « make any order that it considers appropriate » in respect of circumstances arising under the

CCAA is not circumscribed or qualified in any way and certainly not by « anything in the Bankruptcy and Insolvency Act (BIA)7 or the Winding-up and Restructuring Act8 in respect of » Steinberg Inc.

9 Thus a **CCAA** Court is not bound, as Canada suggests, to follow any explicit (legislative) or implicit (jurisprudential) qualifications affecting a BIA Court's power to award **costs** or the manner in which such awards may be made.

10 Subsection 197(2) of the BIA provides an excellent example of just such a qualification that has received the attention of our Courts. After enacting that **costs** in BIA proceedings « are in the discretion of the Court », subsection 197(2) provides that:

> 197(2) The court in awarding **costs** may direct that the **costs** shall be taxed and paid as between party and party or as between **solicitor** and **client**, or the court may fix a sum to be paid in lieu of taxation or of taxed **costs**, but in the absence of any express direction **costs** shall follow the event and shall be taxed as between party and party.

11 Our Court of Appeal has held that the clear and unambiguous words of subsection 197(2) mean that the Court may only award **costs** otherwise than « as between party and party » when pronouncing on the merits of a proceeding. If it fails to do so in the judgment on the merits, it cannot revisit or revise its order in such judgment as to **costs**. There is, says the Court of Appeal, « chose jugée » on the issue of **costs**,[9] at least in bankruptcy matters.

11 *B. What is appropriate?*

12 The Court has administered the Plan since it was approved in 1993; in particular, the collection and distribution to the unsecured creditors of Steinberg Inc. of the Litigation proceeds despite attempts by certain secured creditors and special creditors like Canada to appropriate such proceeds. Over the years, the Monitor has been hard pressed to preserve these proceeds for the unsecured creditors. The Litigation proceeds are all that is left for the creditors and the predators continue to circle the wagons.

13 The only source of revenue to pay the **costs** of keeping these predators at bay are the Litigation proceeds themselves. Most recently, these proceeds have been depleted by some $64,000 to fend off Canada's unsuccessful attempt to, in effect, seize them before judgment. This attempt has also delayed by more than a year a partial payment to the unsecured creditors from the Litigation proceeds.

14 What is appropriate in the circumstances of this case is clear; the predator should be invited to replenish the fund holding the Litigation proceeds destined for the unsecured creditors by the amount such fund has been impoverished by its aggressive behavior.

15 Perhaps the time has come to hold sophisticated litigants to account for the damage or suffering they cause by the aggressive or even abusive exercise of their perceived rights. This is not to suggest that Canada has in any way abused its perceived rights, but it has certainly adopted an aggressive and even proprietary interest in the Litigation proceeds belonging to the unsecured creditors of Steinberg Inc.

15 *C. Similarity to an Article 15 claim*

16 The Monitor's application to replenish the Litigation proceeds by the amount he has had to pay from such funds to defend the interests of the unsecured creditors of Steinberg Inc. is akin to a claim based on article 15 of the Tariff[10] for a special fee, a claim that is routinely heard and decided, usually by the same judge who pronounced the judgment on the merits, after such judgment. There is no issue in article 15 claims of « chose jugée » for the very good reason that a simple award of « **costs** » in Quebec assumes all applicable fees contemplated by the Tariff.

17 However, Canada asserts that the criteria for an article 15 claim are not met in the circumstances of this case. With respect, the Court disagrees for the very reasons that Canada raises to justify its aggressive behavior. Canada urged the Court to recant from previous decisions holding that the funds comprising the Litigation proceeds belonged to the unsecured creditors of Steinberg Inc. on the basis that (a) it was not bound by the decisions in cases where it was not a named party and (b) the transfer of such proceeds was never properly perfected.

TAB 16

Most Negative Treatment: Check subsequent history and related treatments.

2013 ABQB 102
Alberta Court of Queen's Bench

SemCanada Crude Co., Re

2013 CarswellAlta 240, 2013 ABQB 102, [2013] A.W.L.D. 1603, [2013] A.W.L.D. 1722, 226 A.C.W.S. (3d) 969, 5 C.B.R. (6th) 331

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

In the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options Inc., and 1380331 Alberta ULC

RMP Energy Inc., formerly Orleans Energy Ltd. Applicant/Respondent and SemCAMS ULC Respondent/Applicant

B.E. Romaine J.

Judgment: February 21, 2013
Docket: Calgary 0801 08510

Proceedings: additional reasons to *SemCanada Crude Co. (Orleans Energy Ltd.), Re* (2012), 2012 CarswellAlta 1376, 2012 ABQB 495, 93 C.B.R. (5th) 149 (Alta. Q.B.); allowed leave to appeal *SemCanada Crude Co. (Orleans Energy Ltd.), Re* (2012), 2012 ABCA 312, 2012 CarswellAlta 1840 (Alta. C.A.)

Counsel: Trevor A. Batty for Applicant / Respondent, RMP Energy Inc., formerly Orleans Energy Ltd.
A. Robert Anderson, Q.C., Daniel Yaverbaum for Respondent / Applicant, SemCAMS ULC

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Costs — Company purchased gas from creditor prior to filing proceedings under Companies' Creditors Arrangement Act — Price of gas was subject to adjustment after "rework" was conducted by company and other parties — Under claims process order, creditors were barred from asserting any claim not filed by December, 2008 — Creditor did not receive rework information for 2007 from company until 2011 — Creditor then brought action claiming adjustment credit — Company successfully applied for declaration that creditor's claims were released by arrangement and for order striking its statement of claim — Application for leave to appeal decision was dismissed and written submissions were made on issue of costs — Usual practice with respect to costs in insolvency matters should not apply — As company was entirely successful in its application, it was entitled to costs — Litigation proceeded in normal course after motion was filed, and no evidence could be found that creditor was guilty of any misconduct during course of litigation that would warrant award of solicitor-client costs — Litigation was factually and conceptually complicated — Costs award of $30,000 all inclusive was appropriate,

representing less than 1/3 of solicitor-client **costs** in complex **application** that was vigorously contested on both sides.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

SemCanada Crude Co. (Orleans Energy Ltd.), Re (2012), 2012 CarswellAlta 1376, 2012 ABQB 495, 93 C.B.R. (5th) 149 (Alta. Q.B.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

ADDITIONAL REASONS relating to costs of judgment reported at *SemCanada Crude Co. (Orleans Energy Ltd.), Re* (2012), 2012 CarswellAlta 1376, 2012 ABQB 495, 93 C.B.R. (5th) 149 (Alta. Q.B.).

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

1 A decision in this application was issued on July 31, 2012: 2012 ABQB 495 (Alta. Q.B.).

2 An application for leave to appeal that decision was dismissed by the Court of Appeal on October 3, 2012. The parties have been unable to agree on **costs** of the **application** and have made written submissions on the issue.

3 SemCAMs submits that Orleans should pay solicitor-client **costs** of $112,550.53 because SemCAMs was successful in the **application** and because, it submits, Orleans' pursuit of its claim was "in blatant disregard" of the plan of arrangement dated July 23, 2009 in these ***Companies' Creditors Arrangement Act*** proceedings which was sanctioned by this Court. SemCAMs submits that an award of costs beyond ordinary costs is warranted for its deterrent effect.

4 Orleans submits that the Court should follow the usual practice in commercial insolvency **applications** and require each party to bear its own **costs**. Alternatively, it submits that a party-party cost award of $11,693.30 (being basic **costs** with no multiple applied) would be appropriate.

5 While there is an established practice in commercial insolvency **applications** of requiring each party to bear their own **costs**, recognizing that creditors faced with a debtor that has sought protection under the ***Companies' Creditors Arrangement Act*** are sometimes forced by the process to have their claims adjudicated, such a practice most often arises with respect to applications that are heard in a summary manner during the cause of negotiations leading to a plan of arrangement. This claim and application are different. Orleans was involved in negotiations with the debtor companies and the Monitor throughout the process, and was aware before the plan of arrangement was sanctioned by the Court of the position the debtors and Monitor were taking on the nature of the A Thirteenth Month "Adjustment" claim, a claim similar in nature to the Price Adjustment Claim that was the subject of the application. Orleans was served with the plan of arrangement and the plan sanction order, and is a sophisticated litigant represented by counsel. In the face of the sanction order, Orleans filed a statement of claim on November 29, 2011 without seeking leave of the Court, requiring SemCAMs to bring its **application** for a declaratory order. Given these circumstances, I find that the usual practice with respect to **costs** in insolvency matters should not apply to this **application**.

6 Thus, as SemCAAMs was entirely successful in its **application**, it is entitled to **costs**. However, the litigation proceeded in the normal course after SemCAMs' motion was filed, and I cannot find any evidence that Orleans was guilty of any misconduct during the course of the litigation that would warrant an award of solicitor-client costs.

7 Costs in the amount of $11,693.30 as submitted as appropriate by Orleans, however, are not sufficient in the circumstances, representing as they do approximately one-tenth of solicitor-client costs. This litigation was factually and

conceptually complicated, as is evident from the contractual arrangement between the parties described in my decision. I do not find the amount of solicitor-client **costs** described by SemCAMs to be surprising, given the nature of the **application** and the steps taken to prosecute it, nor is there any evidence that the amount charged was exorbitant, other than the bare assertion of Orleans. I find that a **costs** award of $30,000 all inclusive is appropriate, representing less than 1/3 of solicitor-client **costs** in a complex **application** that was vigorously contested on both sides.

Order accordingly.

TAB 17

Most Negative Treatment: Check subsequent history and related treatments.

2011 ONSC 7465
Ontario Superior Court of Justice [Commercial List]

Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.

2011 CarswellOnt 14401, 2011 ONSC 7465, 88 C.B.R. (5th) 320

Return on Innovation Capital Ltd. as agent for Roi Fund Inc, Roi Sceptre Canadian Retirement Fund, Roi Global Retirement Fund and Roi High Yield Private Placement Fund and Any Other Fund Managed by Roi from time to time (Applicants) and Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co and Gandi Special Holdings LLC. (Respondents)

Newbould J.

Judgment: December 16, 2011
Docket: 09-CL-8172

Proceedings: additional reasons to *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Maya Poliak for Monitor, BDO Canada Limited
Mathew Halpin, Evan Cobb for TA Associates Inc.
Christopher J. Cosgriffe for Harry Gandy, James Gandy, Trent Garmoe

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
XX Miscellaneous

Headnote

Bankruptcy and insolvency --- Miscellaneous
Costs — GG was group of companies under protection pursuant to Companies' Creditors Arrangement Act (CCAA) — GH LLC was parent of other companies in GG — Creditors were officers and board members of GH LLC — T Inc. invested in GG by way of debt and equity — T Inc. brought arbitration proceedings against creditors for recovery of its investment in GG — Creditors filed proof of claim against GG based on indemnity provisions — Creditors claimed they were entitled to indemnification by GG in respect of any damages award made against them in arbitration — Creditors disputed monitor's disallowance of indemnity claims — Monitor brought motion for advice and directions relating to creditors' indemnity claims — Motion was granted — Parties made submissions regarding costs — Certain creditor awarded $30,000, monitor awarded $50,000 for counsel fees and disbursements, and $12,000 for its own fees and disbursements — Making costs orders in proceedings under CCAA was not rare occurence — Monitor was successful and was entitled to costs — Monitor in proceedings had unusual functions such as filing plan — Claimants were sophisticated creditors whose claim of indemnification was intended to dilute unsecured creditors' claim — Monitor acted properly — Taking position contrary to claimants did not disentitle monitor from costs — Participation of certain creditor was not redundant and creditor was entitled to costs — Claimants' assertion that indemnities were under control of monitor added time to proceedings — Rates and time spent by counsel were not excessive.

Table of Authorities

Cases considered by *Newbould J.*:

Calpine Canada Energy Ltd., Re (2008), 2008 CarswellAlta 1163, 2008 ABQB 537, 46 C.B.R. (5th) 243 (Alta. Q.B.) — followed

Canadian Asbestos Services Ltd. v. Bank of Montreal (1993), 21 C.B.R. (3d) 120, [1995] G.S.T.C. 36, 1993 CarswellOnt 226 (Ont. Gen. Div.) — considered

Frazer v. Haukioja (2010), 261 O.A.C. 138, 101 O.R. (3d) 528, 73 C.C.L.T. (3d) 167, 317 D.L.R. (4th) 688, 2010 ONCA 249, 2010 CarswellOnt 1996 (Ont. C.A.) — considered

Grant Forest Products Inc., Re (2009), 58 C.B.R. (5th) 127, 2009 CarswellOnt 6099 (Ont. S.C.J. [Commercial List]) — considered

Grant Forest Products Inc., Re (2010), 276 O.A.C. 43, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23, 2010 CarswellOnt 3001, 2010 ONCA 355, 318 D.L.R. (4th) 598 (Ont. C.A.) — considered

Indalex Ltd., Re (2011), 2011 CarswellOnt 9077, 2011 ONCA 578, 92 C.C.P.B. 277, 81 C.B.R. (5th) 165 (Ont. C.A.) — followed

Risorto v. State Farm Mutual Automobile Insurance Co. (2003), 32 C.P.C. (5th) 304, 2003 CarswellOnt 934, 64 O.R. (3d) 135 (Ont. S.C.J.) — considered

Thomas Cook Canada Inc. v. Skyservice Airlines Inc. (2011), 2011 CarswellOnt 10334, 2011 ONSC 5756 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01 — referred to

ADDITIONAL REASONS to judgment reported at *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.* (2011), 2011 CarswellOnt 8590, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List]), respecting costs.

***Newbould J.*:**

1 On August 25, 2011 I released my endorsement on a motion brought by BDO Canada Limited in its capacity as a court-appointed Monitor of Gandi Innovations Limited, Gandi Innovations Holdings LLC, Gandi Innovations LLC, Gandi Innovations Hold Co, and Gandi Special Holdings LLC (the "Gandi Group") for advice and directions, and particularly to determine preliminary issues in connection with the indemnity claims made by Hary Gandy, James Gandy and Trent Garmoe (the "Claimants") against all of the Gandi Group.

2 The Monitor was successful and seeks costs of the motion on a partial indemnity basis. The position of the Monitor was

supported by TA Associates, Inc. ("TA Associates ") which also seeks costs on a partial indemnity basis. The cost orders are opposed by the Claimants.

3 The usual rule is that absent some special circumstance, costs follow the event. In this case, the Claimants assert that costs are rarely made in a CCAA proceeding and should not be made in this case. Reliance is placed on the following statement of the Ontario Court of Appeal in *Indalex Ltd., Re* (2011), 81 C.B.R. (5th) 165 (Ont. C.A.):

> 4. We make no order as to costs of the underlying motions. We understand that the conventional approach in CCAA proceedings is to rarely make costs orders, with the result that each party bears its own costs. There are sound policy reasons that underlie this approach, which include the reality that as a result of the situation of the insolvent company, the amount of funds available for distribution is limited and parties ought not to expect to recover their litigation costs: see *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487, at para. 31 (Gen. Div.) and *Re Calpine Canada Energy Limited*, [2008] A.J. No. 965, at para. 1. We see no reason to depart from the usual practice.

4 The statement of the Court of Appeal that cost orders are rarely made in CCAA proceedings is somewhat surprising. Recently, for example, in *Grant Forest Products Inc., Re* (2009), 58 C.B.R. (5th) 127 (Ont. S.C.J. [Commercial List]) in a motion in a CCAA proceeding between the former chairman and the secured lenders, I ordered costs to be paid to the former chairman. That decision was affirmed by the Court of Appeal (2010), 101 O.R. (3d) 383 (Ont. C.A.) in which costs were also awarded for the appeal. See also my comments in *Thomas Cook Canada Inc. v. Skyservice Airlines Inc.*, [2011] O.J. No. 4378 (Ont. S.C.J. [Commercial List]) in a case dealing with costs in a receivership matter.

5 I do not read the decision of the Court of Appeal as laying down a principle that costs should rarely be ordered in CCAA proceedings. The statement is "We understand that..." and indicates that the court was essentially passing on what it was told, which I think was an overstatement. The cases cited do not stand for any general principle that costs are rarely ordered. In *Canadian Asbestos Services Ltd. v. Bank of Montreal* [1993 CarswellOnt 226 (Ont. Gen. Div.)], Chadwick J. in declining costs in a CCAA proceeding stated:

> I appreciate SGB 2000 Inc. has incurred a large number of legal costs in disputing these various applications. However, it was apparent very early in these proceedings that there was going to be limited funds available for distribution. As such counsel should have considered the cost to the client, and the likelihood they would not recover costs.

6 In ***Calpine Canada Energy Ltd., Re*** [**2008 CarswellAlta 1163** (Alta. Q.B.)] Romaine J. ordered costs to be paid in a CCAA proceeding. Regarding the issue of whether costs are ordered in CCAA proceedings, she did not state that costs are rarely made, but rather that it was often that cost orders were not made. She stated:

> Often in proceedings under the Companies' Creditors Arrangement Act, costs are not awarded against unsuccessful parties.

7 I agree with Romaine J. that cost orders are often not made in CCAA proceedings. I do not agree that they are rarely made and, as I said, I do not read the decision in *Re Calpine* as dictating otherwise.

8 The Claimants contend that in CCAA proceedings, Monitors are officers of the court with an obligation to act independently and to consider the interests of the debtor and creditors, with a duty to remain neutral as between the various stakeholders in the CCAA proceedings. Thus it is claimed that the Monitor should not be entitled to costs for taking a position that was contrary to the interests of the Claimants.

9 While Monitors are officers of the court and intended normally to provide neutral services and neutral advice, BDO in this case had obligations beyond that of a typical Monitor. By order of Cameron J. dated March 9, 2010, BDO as Monitor was empowered and authorized to do a number of things on behalf of the Gandi companies, including being authorized to file a plan of compromise or arrangement. This order was necessitated because under the CCAA process, all of the business and assets of the Gandi companies had been sold and all of the directors and officers had resigned and there was no functioning board of directors. Proceeds from the sale were sufficient to pay off secured creditors and on the same day, BDO was authorized by Cameron J. to establish a claims procedure to distribute the available cash from the sale of assets among the unsecured creditors.

10 The claims process was substantially completed by November 2010 and the Monitor prepared a consolidated plan of compromise and arrangement and scheduled a motion for approval to file the plan. On December 20, 2010 the Claimants filed proofs of claim in excess of $76 million. The basis for their claim is set out in my endorsement of August 25, 2011. On February 18, 2011 the Claimants brought a motion for leave to file their claims. At that time the Monitor raised concerns regarding the evidence supporting the claims and the fact that a portion of them appeared to constitute equity claims. Morawetz J. granted the Claimants leave to file their claims late and noted that the Monitor could apply to the court regarding preliminary issues that had been identified.

11 The Claimants alleged that they were *de jure* directors and officers of the corporate entities in the Gandi Group. TA Associates had advanced $75 million to the Gandi Group by way of $25 million of debt and $50 million of equity. In January 2009, TA Associates commenced an arbitration proceeding against the Claimants. In the arbitration TA Associates claimed damages against the Claimants in an amount of US $75 million with interest, being the total amount of TA Associates' investment in the Gandi Group. The arbitration has not yet been heard on its merits.

12 The Claimants asserted an entitlement to indemnification by the Gandi Group in respect of any award of damages which may be made against them in the arbitration together with all legal fees incurred by the Claimants in defending the arbitration. Their right to be indemnified was hotly contested as was the question of whether their claim was an equity claim has to $50 million. The Claimants were thus not normal creditors in a CCAA proceeding, but rather sophisticated individuals seeking to put themselves in a position to substantially dilute the unsecured creditors on an indemnity that had to be determined, one way or the other. The indemnity claims of the Claimants, if permitted, would have delayed distributions to all creditors for a considerable period of time.

13 On March 11, 2011 the Monitor disallowed the indemnity claims of the Claimants and advised them that based on the evidence filed in support of the indemnity claims, any indemnity claim would be solely against Gandi Holdings. The Claimants then served a notice of dispute, which led to the motion before me.

14 In the circumstances of this case, I find no fault with the actions of the Monitor in bringing the matter before the Court and taking the position that it did. It really had no other choice. It was the Monitor who was charged with the responsibility of filing a plan of compromise and arrangement, and the form in which the plan would finally be settled depended on the outcome of the motion.

15 In the circumstances, I am of the view that Monitor is entitled to its costs on a partial indemnity basis as it was successful.

16 The claim for costs by TA Associates is opposed by the Claimants. TA Associates is a substantial creditor and would be severely affected if the indemnity claims of the Claimants were accepted by the Monitor. It participated in the motion. It filed an affidavit of Mr. Johnson who was cross-examined by counsel for the Claimants. TA Associates' counsel examined one of the Claimants on his affidavit and participated fully in the motion. The Claimants oppose any order for costs in favour of TA Associates whose participation they contend was redundant. I do not agree. Whether the indemnities are proper claims in the CCAA proceedings is of importance to TA Associates because the indemnities are said to protect the Claimants in the event that an award is made against them in the arbitration commenced by TA Associates in the U.S. The Claimants had to know that if they succeeded in their position, that would give them some leverage in the arbitration proceedings as TA Associates would be making a claim in the arbitration that if successful would partially end up coming out of its own pocket. The Claimants could not have expected TA Associates to sit back, particularly as it was the Monitor who brought the motion for directions and it was not clear at the outset exactly what the Monitor would do in the motion.

17 In my view TA Associates is entitled to its costs, although some recognition is to be given to the fact of duplication of efforts in considering what a fair and reasonable cost order is to be made against the Claimants.

18 The monitor seeks costs of $45,431.09, inclusive of HST, for fees and disbursements of $10,804.91, inclusive of HST. It also seeks fees and disbursements from BDO of $12,178.99, inclusive of HST. Apart from the usual work done on a motion such as this, because the Claimants alleged they were officers and directors of all members of the Gandi Group, it was necessary to consult U.S. Counsel regarding some of the Gandi companies that were incorporated in Delaware and Texas. In

the face of a lack of written indemnities, the Claimants took the position that the indemnities were in the possession, power or control of the Monitor. Because of that position taken by the Claimants, counsel for the Monitor had to attend at the offices of the former solicitors of the Gandi Group to review the corporate governance documents. BDO and its counsel had to review 11 boxes of books and records of the Gandi Group in storage and 29 additional boxes at the Claimants' request. The Monitor was also required to review the books and records of the Gandi Group to disprove the allegations made by the Claimants that the Monitor authorized payment of certain legal fees of the Claimants in the arbitration.

19 The Claimants contend that the work done by counsel for BDO was excessive. While it is not required that the Claimants produce information as to the amount of time spent by its counsel, its failure to do so is something to be taken into account. In *Risorto v. State Farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), Wrinkler J. (as he then was) stated:

> The attack on the quantum of costs, insofar as the allegations of excess are concerned, in the present circumstances is no more than an attack in the air. I note that State Farm has not put the dockets of its counsel before the court in support of its submission. Although such information is not required under Rule 57 in its present form, and the rule enumerates certain factors which would have to be considered in exercising the discretion with respect to the fixing of costs in any event, it might still provide some useful context for the process if the court had before it the bills of all counsel when allegations of excess and "unwarranted over-lawyering" are made. In that regard, the court is also entitled to consider "any other matter relevant to the question of costs". (See rule 57.01(1)(i).) In my view, the relative expenditures, at least in terms of time, by adversaries on opposite sides of a motion, while not conclusive as to the appropriate award of costs, is still, nonetheless, a relevant consideration where there is an allegation of excess in respect of a particular matter.

20 In *Frazer v. Haukioja*, 2010 ONCA 249 (Ont. C.A.), it was contended that the trial judge erred in awarding costs against the defendant. LaForme, J.A. for the court stated:

> Dr. Haukioja argued before the trial judge that Grant Frazer's counsel docketed almost twice as much time as his own. This, he says is relevant to Dr. Haukioja's reasonable expectations and establishes that he could not reasonably have expected Mr. Frazer's counsel to have invested so much more time than his own.
>
> The answer to this argument is found in the submissions of Grant Frazer that were made to this court.
>
> In making his finding with respect to the application of that part of rule 57.07(1)(0.b) "the amount of costs that an unsuccessful party could reasonably expect to pay..." the trial judge noted Mr. Haukioja's failure to provide adequate information as to his own legal costs incurred. He also agreed with the observations of Nordheimer J. in *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660at para.16 that, "the failure to volunteer that information may undermine the strength of the unsuccessfully part's criticisms of the successful party's requested costs." In that regard, his decision is entirely consistent with the authorities, and in particular the dicta of the Divisional Court in Andersen, "the inference must be that the [unsuccessful] Defendants devoted as much or more time and money" as did the successful Plaintiffs: *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. S.C.J.) at paras. 24 to 27.

21 In reviewing the cost outline filed on behalf of the Monitor, nothing on the face of it would indicate that excessive time was spent. This was not a straightforward matter by any means and involved some novel issues. Nor do I think that the hourly rates used were excessive, being $350 per hour for Mr. Chaiton who was called in 1982 and $170 for Ms. Poliak who was called in 2007.

22 The Claimants contend that work done by BDO should not be permitted. The work done by BDO was entirely in connection with the motion and was necessitated by the need to review books and records and to supervise the Claimants' review of the record boxes. These costs would not have been incurred but for the position taken by the Claimants. In my view the cost of the work done by BDO was for and incidental to the motion and permissible in accordance with section 131 of the *Courts of Justice Act*.

23 TA Associates claims fees of $37,055 and disbursements of $4,522.11. In reviewing the cost outline filed on behalf of TA Associates, nothing on the face of it would indicate that excessive time was spent. As well, the hourly rates appear

reasonable, being $350 per hour for Mr. Halpin who was called in 1986 and $165 per hour for Mr. Cobb who was called in 2008.

24 Taking into account the factors enumerated in rule 57.01, including the time spent, the results achieved, the complexity of the matter, the issue of possible duplication by counsel for the Monitor and for TA Associates, and also considering the amount of costs that an unsuccessful party such as TA Associates in the circumstances of this motion could reasonably expect to pay, I order that costs be paid by the Claimants within 30 days as follows:

1. To the Monitor for its counsel's fees and disbursements, $50,000 inclusive of HST.
2. To the Monitor for its fees and disbursements, $12,000 inclusive of HST.
3. To TA Associates for its counsel's fees and disbursements, $30,000 inclusive of HST.

Order accordingly.

TAB 18

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

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.8 Costs
    XVII.8.h Miscellaneous

Civil practice and procedure
XXIV Costs
  XXIV.7 Particular orders as to costs
    XXIV.7.n Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous issues
Corporation sought protection of Companies' Creditors Arrangements Act ("CCAA") — Group representing corporation ("group") sought to sell various assets — Process of marketing assets was abbreviated and evolved rapidly — K Inc. had signed agreement that restricted it from bidding on assets — H Inc. and C Inc. bid on certain assets — Group successfully applied for approval of H Inc.'s bid — C Inc. and K Inc. unsuccessfully applied to set aside approval — Parties made submissions on costs of C Inc. and K Inc.'s applications — Costs awarded against C Inc. and K Inc. — Costs are often not

awarded against unsuccessful parties in CCAA proceedings as they are generally involuntary parties, compelled to participate due to debtor seeking CCAA protection — K Inc. and C Inc. were sophisticated commercial entities that entered into proceedings voluntarily in attempt to better their positions with respect to acquiring fund-related assets — Policy reasons underlying no-costs convention were not operative in present case — There was no reason to depart from general rule awarding costs to successful parties.

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous orders
Corporation sought protection of Companies' Creditors Arrangements Act ("CCAA") — Group representing corporation ("group") sought to sell various assets — Process of marketing assets was abbreviated and evolved rapidly — K Inc. had signed agreement that restricted it from bidding on assets — H Inc. and C Inc. bid on assets — Group successfully applied for approval of H Inc.'s bid — C Inc. and K Inc. unsuccessfully applied to set aside approval — Parties made submissions on costs of C Inc. and K Inc.'s applications — Group awarded costs in sum of $15,000 against each of K Inc. and C Inc. — Applications had little chance of success, but given context in which they were brought it could not be found that they were so improper or vexatious as to warrant award of complete indemnity costs — Schedule C of Alberta Rules of Court was inappropriate guide to party and party costs claimed, given accelerated and intense process necessitated by nature of motions and litigation — Other successful parties were each entitled to costs in amount of $6,300 against each of K Inc. and C Inc., roughly commensurate with principle that costs award should provide 40 to 50 percent indemnity.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

LSI Logic Corp. of Canada Inc. v. Logani (2001), 100 Alta. L.R. (3d) 49, 2001 ABQB 968, 2001 CarswellAlta 1733, [2002] 4 W.W.R. 531 (Alta. Q.B.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs — referred to

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 19

2017 ONSC 314
Ontario Superior Court of Justice

Silver Streams Homes Inc., Re

2017 CarswellOnt 380, 2017 ONSC 314, 275 A.C.W.S. (3d) 713

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

H.J. Wilton-Siegel J.

Heard:
Judgment: January 13, 2017
Docket: 13-10362-00CL

Counsel: S. Schwartz, M. Poliak, for Applicants
A. Slavens, for Tarion Warranty Corporation
J. Klein, for MediGroup Incorporated and certain other lien claimants
E. Bisceglia, for Argo Lumber Inc. and Newmar Window Manufacturing Inc.
I. Aversa, for Monitor

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.h Miscellaneous

Headnote

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Miscellaneous
Applicants in proceeding under Companies' Creditors Arrangement Act, several affiliated companies, brought motion for approval of settlement agreement between themselves, their shareholder and warranty company which was intended to rectify apparently unintended registration error that had resulted in warranty company being unable to draw on certain letters of credit — Certain lien claimants, group of suppliers and group of trades, filed notices of objection — Warranty company chose to appear and make submissions in support of motion — Shareholder, who later made proposal under Bankruptcy and Insolvency Act, did not — Motion was dismissed and lien claimants sought costs from applicants and warranty company — Costs awarded against applicants — While warranty company had not brought motion, it had chosen to participate with view to improving its priority — There was no reason in principle costs should not be awarded against it — Warranty company had not, however, received any notice of lien claimants' intention to seek costs against it — It could easily have understood references to costs contained in notices of objection to refer to costs against applicants only — It would not be appropriate to

order warranty company to pay costs in circumstances.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Applicants in proceeding under Companies' Creditors Arrangement Act, several affiliated companies, brought motion for approval of settlement agreement between themselves, their shareholder and warranty company which was intended to rectify apparently unintended registration error that had resulted in warranty company being unable to draw on certain letters of credit — Certain lien claimants, group of suppliers and group of trades, filed notices of objection — Warranty company chose to appear and make submissions in support of motion — Shareholder, who later made proposal under Bankruptcy and Insolvency Act, did not — Motion was dismissed and lien claimants sought costs from applicants and warranty company — Applicants (and their second secured lenders) submitted no costs should be awarded against them as they would not have received any economic benefit from motion if approved — Monitor agreed — Costs awarded against applicants — Lien claimants were justified in seeking order for costs on basis they had expended funds to pursue result that benefitted all creditors — It would be appropriate for applicants to pay those costs, but only to extent applicants actually received security or benefits of efforts — Warranty company relieved of any obligation to pay costs by lack of notice — Given amount at issue in proceeding (some $1 million), novelty and complexity of matter, importance to both lien claimants and other creditors, and some duplication of effort, group of suppliers and group of trades were entitled to fair and reasonable costs on partial indemnity basis in amount of $17,500 each — If security or benefits received by applicants was insufficient, groups should share amount available on pro rata basis.

Table of Authorities

Cases considered by *H.J. Wilton-Siegel J.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291, 188 O.A.C. 201 (Ont. C.A.) — referred to

Calpine Canada Energy Ltd., Re (2008), 2008 ABQB 537, 2008 CarswellAlta 1163, 46 C.B.R. (5th) 243 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01 — considered

R. 57.01(1) — considered

ADJUDICATION on costs.

***H.J. Wilton-Siegel J.*:**

1 The applicants in these proceedings brought a motion under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for approval of an agreement (the "Settlement Agreement") among the applicants, Tarion Warranty Corporation ("Tarion") and Imran Jinnah ("Jinnah"), the shareholder of the applicants. Certain lien claimants successfully challenged the motion (collectively the "Lien Claimants"). These lien claimants are: (1) Argo Lumber Inc. ("Argo") and

to an intention to seek costs, which could easily have been understood to mean in respect of the applicants only.

9 The Lien Claimants say that the issue of costs was raised in settlement discussions prior to the motion. They say that, by proposing a settlement on a no-costs basis, it was clear to the other parties that the Lien Claimants would seek costs against the applicants and Tarion if the motion were not resolved. I do not think this is sufficient to constitute adequate prior notice of an intention to seek costs against Tarion. If objecting parties intend to pursue other creditors or other stakeholders in proceedings under the CCAA, express notice in writing should be required.

10 Accordingly, I conclude that it is not appropriate to award costs against Tarion because there was no prior adequate notice of the Lien Claimants' intention to seek costs against it.

Costs in Respect of the Applicants and the Private Mortgagees

11 The applicants submit that no costs should be awarded against them. They submit that, although they were required to bring the motion for approval of the Settlement Agreement, being a party to proceedings under the CCAA, they would not have received any economic benefit if it had been approved.

12 In addition, the second mortgage lenders to the applicants also submit that no costs should be awarded against the applicants. These lenders comprise Puccini Mortgage Corporation, Depaul Management Limited, 388242 Ontario Limited, 53 Puccini Mortgage Corporation, Castle Lane Design Group Inc. and Nastell Investments Limited (collectively the "Private Mortgagees"). As the second secured creditors against the estate of the applicants, and given the assets of the estate, any costs award would be paid out of funds that would otherwise be available to satisfy the claims of the Private Mortgagees.

13 The Monitor supports the position of the applicants, noting that costs awards under the CCAA are rarely made and only against unsuccessful parties rather than against a passive estate. The Monitor notes that the underlying rationale for this approach has been expressed by Romaine J. in *Calpine Canada Energy Ltd., Re*, **2008 ABQB 537, 46 C.B.R. (5th) 243** (Alta. Q.B.) as follows, at para. 1: "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." However, Romaine J. further reasoned that, where the parties are sophisticated commercial entities that commence litigation in an attempt to better their positions, the policy reasons that underlie the no-costs convention are not operative. In such circumstances, there is no reason to depart from the general rule of awarding costs to the successful parties, not as a punishment, but as recognition of the usual risks of litigation.

14 I propose to first discuss the merits of the Lien Claimants' claim for costs in respect of the applicants without regard to the position of the Private Mortgagees, and then to address the merits of the position of the Private Mortgagees.

The Issue of Costs Against the Applicants

15 The Lien Claimants were not parties to the Settlement Agreement, nor did they stand to benefit from their opposition except in the same manner as all other creditors of the applicants' estate, subject to the ranking of the claims of such creditors. As a result of the Lien Claimants' successful objection, the Security deposited with Bank of Montreal ("BMO") to secure the obligations of the applicants who posted the letters of credit issued in favour of Tarion is available to the estate of the applicants. Accordingly, the applicants have potentially benefitted from the successful objections of the Lien Claimants, as have the creditors of the applicants, including in particular the Private Mortgagees, notwithstanding the fact that they were passive participants. Given the foregoing, payment of the costs of the Lien Claimants would not constitute a preference in their favour, nor would it offend the principle that has informed the practice of refraining from awarding costs in the ordinary course.

16 In my view, therefore, this is an appropriate circumstance in which to award costs against the applicants, subject to consideration of the equities in respect of the Private Mortgagees who would effectively be paying any such costs award.

The Issue of Costs as Between the Lien Claimants and the Private Mortgagees

17 The position of the Private Mortgagees raises an additional complication.

18 After the hearing of the motion, the Lien Claimants' claims were resolved in the context of a court-ordered reference. The minutes of settlement pertaining to Argo and Newmar provided that they were entitled to any costs that the Court may award in respect of this motion. The minutes of settlement pertaining to the Trades had a similar reservation regarding costs of this motion.

19 I agree with the Lien Claimants that it would reasonably have been expected that the claim for costs that they reserved in the minutes of settlement were their respective claims against the applicants, rather than their claims against Tarion and Jinnah. These latter parties were not parties to the settlement discussions or to the documentation referred to above. As such, it was neither necessary to refer to a claim for costs against them, nor would any such reference have had any legal significance except if the parties intended to limit claims for costs to such parties, which was not the case in this proceeding. Accordingly, as between the Lien Claimants and the Private Mortgagees, the Lien Claimants are not prevented from asserting a claim for costs of this motion by virtue of the documentation discussed above.

20 Turning to the relevant considerations, there is no suggestion that the Lien Claimants indicated to the Private Mortgagees that they would seek costs against the estate of the applicants. Moreover, the Private Mortgagees did not participate in the motion or in the settlement discussions regarding the motion in which the Lien Claimants say that their position should have become obvious. On the other hand, the Private Mortgagees benefitted from the Lien Claimants' opposition to the motion. At the present time, however, the quantum of the Security to be released by Bank of Montreal remains an issue to be resolved between Tarion and the applicants.

21 The justification for any costs award in favour of the Lien Claimants is their expenditure of funds for the benefit of all of the creditors. Balancing the foregoing considerations, I conclude that it would be appropriate to order that the reasonable costs of the Lien Claimants shall be payable by the applicants but only to the extent that the applicants actually receive the Security or the benefit thereof.

Quantum of Fair and Reasonable Costs

22 Turning to quantum, Argo and Newmar seek costs of $20,458.89 while Medi seeks costs of $30,162.50, in each case on a partial indemnity basis. The Court is required to exercise its discretion to fix costs that are fair and reasonable in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: see *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

23 I would observe that, in each case, the rates charged appear reasonable for counsel who were experienced in this area. However, I have adjusted the partial indemnity calculation of Argo and Newmar to reflect 60% of the actual rate charged. Further, some allowance should also be made for the duplication of effort of these two groups of Lien Claimants, as they essentially argued the same position.

24 Turning to the factors in Rule 57.01, I note that the matter was important to the Lien Claimants and was also of benefit to the other creditors who share in the Security. Further, the matter was novel and relatively complex, both factually and legally. I have also taken into consideration the amount at issue, being approximately $1 million, as well as the duplication of effort referred to above.

25 Based on the foregoing, I find fair and reasonable costs to be $17,500 payable to Newmar and Argo, collectively, and $17,500 payable to the Trades, collectively, provided, however, that such costs are payable by the applicants only to the extent that the applicants actually receive the Security, or the benefit thereof, it being understood that any lesser amount received should be shared between the Lien Claimants on a pro-rata basis.

Costs awarded.

End of Document

TAB 20

2004 CarswellQue 9553
Quebec Superior Court

Uniforêt inc., Re

2004 CarswellQue 9553, 7 C.B.R. (5th) 119, J.E. 2005-354, EYB 2004-81121

In the matter of the arrangement of: Uniforêt Inc., Uniforêt scierie-pâte Inc. and Foresterie Port-Cartier inc. (collectively, Uniforêt) (Debtors - Petitioners) and Richter & Associés (Monitor) (Monitor - Mis en cause) and Jolina Capital Inc. (Jolina) (Mis en cause - Petitioner) v. Highland Capital Management, L.P. (Highland), ML CBS IV (Cayman) Ltd., Pamco Caymon, Ltd., Highland Legacy, Ltd., Pam Capital Funding, L.P., Prospect Street High Income Portfolio Inc. (Prospect) (Opposing creditors)

Tingley S.C.J.

Heard: November 3-9, 2004
Judgment: November 30, 2004
Docket: C.S. Montréal 500-05-064436-015

Counsel: Me Sylvain Rigaud for "Uniforêt"
Me Jean Fontaine et Me Charles Nadeau for "Jolina"
Me Martin Desrosiers, Me Karim Renno et Me David Tardif-Latourelle for "Opposing Creditors"

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.d Award of costs
XVII.8.d.i General principles

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.e Tariff for legal costs

Civil practice and procedure
XXIV Costs
XXIV.9 Particular items of costs
XXIV.9.d Disbursements
XXIV.9.d.i Expert reports

Civil practice and procedure
XXIV Costs
XXIV.16 General considerations on taxation or assessment
XXIV.16.g Whether special skill required

Professions and occupations

IX Barristers and solicitors
IX.5 Fees
IX.5.f Accounting and refunding by solicitor
IX.5.f.iv Application for assessment, review, or taxation of account
IX.5.f.iv.E Considerations on review of account
IX.5.f.iv.E.8 Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Tariff for legal costs
Opposing creditors, holders of U.S. notes issued by debtor corporation, contested classification of creditors proposed in debtor's plan of arrangement under Companies' Creditors Arrangement Act — Opposing creditors sought leave to appeal trial judgment finding proposed classification was appropriate and leave was refused — Opposing creditors contested approval of debtor's plan of arrangement — Plan of arrangement was approved by other trial judge — Both trial judgments as well as appellate judgment awarded costs to debtor and creditor supporting debtor — Debtor and supporting creditor brought motions for taxation of costs, each claiming over $1 million based on ss. 15 and 42 of Québec Tariff of Judicial Fees of Advocates — Motions allowed in part — In awarding costs in CCAA cases, Canadian courts have almost always resorted to provincial tariffs to determine quantum of costs — While costs are frequently waived because applications under CCAA are usually submitted after lengthy negotiations, Canadian courts have not hesitated to award costs where applications are contested — Québec court is no different and tariff applies unless otherwise determined by court — No valid or compelling reason existed to rule out application of tariff to awards of costs here, given no suggestion was ever made that costs be based on something else — While costs should be "sparingly" granted in insolvency matters, application in instant case of other principles warranted equal consideration since costs were awarded against minority group of cranky speculators who were found to have overreached in aggressive attempts to secure better deal for themselves from debtor in distress.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Award of costs — General principles
Opposing creditors, holders of U.S. notes issued by debtor corporation, contested classification of creditors proposed in debtor's plan of arrangement under Companies' Creditors Arrangement Act — Opposing creditors sought leave to appeal trial judgment finding proposed classification was appropriate and leave was refused — Opposing creditors contested approval of debtor's plan of arrangement — Plan of arrangement was approved by other trial judge — Both trial judgments as well as appellate judgment awarded costs to debtor and creditor supporting debtor — Debtor and supporting creditor brought motions for taxation of costs, each claiming over $1 million based on ss. 15 and 42 of Québec Tariff of Judicial Fees of Advocates — Motions allowed in part — Had opposing creditors succeeded in contestation, result might have been better offer in new plan, and not necessarily bankruptcy — What was at issue in concerned proceedings was not debtor's survival or realization of several million-dollar claims against debtor but rather fairness of plan as regarding class in which opposing creditors were — Relief sought was "akin to declaratory relief" — Value in issue could not be readily determined because sanction of plan, requiring considerations of fairness, equity and lack of oppression, neither affected validity of opposing creditors' claims nor resolved dispute as to what payment creditors should receive under plan, which issues were adressed in plan — Even difference between plan's offer and what opposing creditors wanted was unknown — While situation might be different for supporting creditor, its subordination initially requested by opposing creditors was not seriously argued at sanction hearing and opposing creditors had moved on to other request — Most realistic conclusion was that relief sought did not involve any identifiable amount or value, since opposing creditors wanted to defeat plan and force negotiations with unknown results — As amount in issue could not be determined, costs were taxed in accordance with Class II-B action under tariff, rather than under s. 42, which awards one per cent of amounts at issue.

Civil practice and procedure --- Costs — General considerations on taxation or assessment — Whether special skill required
Opposing creditors, holders of U.S. notes issued by debtor corporation, contested classification of creditors proposed in debtor's plan of arrangement under Companies' Creditors Arrangement Act — Opposing creditors sought leave to appeal trial judgment finding proposed classification was appropriate and leave was refused — Opposing creditors contested approval of debtor's plan of arrangement — Plan of arrangement was approved by other trial judge — Both trial judgments as well as appellate judgment awarded costs to debtor and creditor supporting debtor — Debtor and supporting creditor brought motions for taxation of costs, each claiming over $1 million on basis of ss. 15 and 42 of Québec Tariff of Judicial Fees of Advocates — Motions allowed in part — In order to decide whether special fee provided by s. 15 of tariff should be awarded, importance of case is determined using 23 objective factors that look at facts and circumstances of case — "Golden

thread" uniting 23 factors is that each factors involves element of time over and above what might be considered normal for any given type of case — Section 15 of tariff seeks to provide adequate compensation to counsel for extra time spent to successfully prosecute or defend action — Factors provide series of objective standards by which to measure greater than normal effort to arrive at successful conclusion — Importance of case is not determined just by advancement of law or controversial issue but by time and effort put in by successful counsel — Special costs are intended to reward legitimate, appropriate or necessary labour, not superfluous work, and abusive use of s. 15 must be avoided — Applying factors to case, facts showed that case was important one justifying award of special fees — Given circumstances of hotly contested plan and fact that this was insolvency matter where one-per-cent fee under s. 42 of tariff was not granted, discretion was exercised to award special fees of $250,000 to debtor's counsel and $125,000 to supporting creditor's counsel.

Civil practice and procedure --- Costs — Particular items of costs — Disbursements — Expert reports
Opposing creditors, holders of U.S. notes issued by debtor corporation, contested classification of creditors proposed in debtor's plan of arrangement under Companies' Creditors Arrangement Act — Opposing creditors sought leave to appeal trial judgment finding proposed classification was appropriate and leave was refused — Opposing creditors contested approval of debtor's plan of arrangement — Plan of arrangement was approved by other trial judge — Both trial judgments as well as appellate judgment awarded costs to debtor and creditor supporting debtor — Debtor and supporting creditor brought motions for taxation of costs, each claiming over $1 million based on ss. 15 and 42 of Québec Tariff of Judicial Fees of Advocates — Debtor also claimed fees of expert amounting to $149,439 — Motions for taxation of costs allowed in part — Expert advised debtor and testified for debtor at trial concerning classification issue, in respect of serious charges, including fraud, levelled at debtor by U.S. counsel representing opposing creditors — Expert's evidence suggested opposing creditors had infringed U.S. securities law in dealings with U.S. secured notes of debtor — Threat of U.S. litigation grounded in fraud was serious matter and warranted retention of expert to dispel foundation of such reckless and defamatory allegations — Trial judge hearing classification issue found expert of opposing creditors had no credibility and found that his evidence was irrelevant — Trial judge did not find evidence of debtor's expert to be irrelevant and characterized it as "uncontradicted" — Opposing creditors had to pay fees of debtor's expert.

Faillite et insolvabilité --- Procédure devant les tribunaux — Frais — Tarif pour les frais judiciaires
Créanciers de la compagnie débitrice, des détenteurs de billets libellés en dollars américains, ont contesté l'ordre de classification des créanciers proposé dans le plan d'arrangement de la débitrice en vertu de la Loi sur les arrangements avec les créanciers des compagnies — Créanciers opposants ont demandé la permission d'en appeler du jugement de première instance concluant que l'ordre de classification proposé était approprié; la permission a été refusée — Créanciers opposants ont contesté l'approbation du plan d'arrangement de la débitrice — Plan d'arrangement a été approuvé par un autre juge — Deux jugements de première instance ainsi que le jugement d'appel ont accordé à la débitrice et à la créancière l'appuyant les dépens contre les créanciers opposants — Débitrice et la créancière la soutenant ont présenté des requêtes en taxation des frais, réclamant chacune plus de 1 million de dollars sur la base des art. 15 et 42 du Tarif des honoraires judiciaires des avocats du Québec — Requêtes accueillies en partie — Lorsque les tribunaux canadiens accordent des dépens dans des procédures en vertu de la LACC, ils utilisent presque toujours les tarifs provinciaux pour en déterminer le montant — Même si on renonce souvent aux dépens parce que les demandes en vertu de la LACC sont généralement le fruit de longues négociations, les tribunaux canadiens n'hésitent pas à accorder les dépens lorsque les demandes sont contestées — Tribunal québécois n'est pas différent, et le tarif s'applique à moins que le tribunal n'en décide autrement — Aucun motif valable ou contraignant n'existait pour décider que le tarif québécois ne s'appliquait pas ici, d'autant plus qu'il n'a jamais été suggéré que les dépens soient calculés sur une autre base — Même si les dépens doivent être accordés avec parcimonie dans le cadre d'affaires en matière insolvabilité, l'application d'autres principes dans ce cas-ci justifiait qu'ils soient également considérés, étant donné que les dépens avaient été accordés contre un groupe minoritaire de spéculateurs grincheux perçus comme ayant exagérés dans leurs tentatives agressives visant à obtenir d'un débiteur en détresse un meilleur rendement pour eux-mêmes.

Faillite et insolvabilité --- Procédure devant les tribunaux — Frais — Octroi des frais — Principes généraux
Créanciers de la compagnie débitrice, des détenteurs de billets libellés en dollars américains, ont contesté l'ordre de classification des créanciers proposé dans le plan d'arrangement de la débitrice en vertu de la Loi sur les arrangements avec les créanciers des compagnies — Créanciers opposants ont demandé la permission d'en appeler du jugement de première instance concluant que l'ordre de classification proposé était approprié; la permission a été refusée — Créanciers opposants ont contesté l'approbation du plan d'arrangement de la débitrice — Plan d'arrangement a été approuvé par un autre juge — Deux jugements de première instance ainsi que le jugement d'appel ont accordé à la débitrice et à la créancière l'appuyant les dépens contre les créanciers opposants — Débitrice et la créancière la soutenant ont présenté des requêtes en taxation des frais, réclamant chacune plus de 1 million de dollars sur la base des art. 15 et 42 du Tarif des honoraires judiciaires des

Uniforêt inc., Re (2003), 44 C.B.R. (4th) 158, 2003 CarswellQue 1843 (C.A. Que.) — referred to

Uniforêt inc., Re (2004), 2004 CarswellQue 237, 2004 CarswellQue 238 (S.C.C.) — referred to

Woolmington v. Director of Public Prosecutions (1935), [1935] A.C. 462, 25 Cr. App. R. 72 (U.K. H.L.) — considered

1644-8987 Québec inc. c. Pneu national inc. (1992), 1992 CarswellQue 1538 (C.S. Que.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Regulations considered:

Barreau, Loi sur le, L.R.Q., c. B-1
Tarif des honoraires judiciaires des avocats, R.R.Q., 1981, c. B-1, r. 13

art. 15

art. 16

art. 42

MOTIONS for taxation of bills of costs in respect of proceedings under *Companies' Creditors Arrangement Act.*

***Tingley S.C.J.*:**

THE ISSUES

1 Counsel for the Debtors (Uniforêt) and the Mise en cause (Jolina) seek approval of the Court to tax the costs due by the Opposing Creditors pursuant to three judgments of this Court - rendered on October 23, 2002, February 18, 2003 and May 16, 2003 - all ordering that costs be paid. Uniforêt asks for costs aggregating $1,602,292. and Jolina seeks $1,341,380. Included in these amounts are claims based on articles 15 ($400,000. and $200,000. respectively) and 42 ($999,000. and $1 134 910. respectively) of the Tariff of Judicial Fees of Advocates (Québec Tariff).[1]

2 The Opposing Creditors assert that costs are rarely sought in matters arising under the *Companies' Creditors Arrangement Act* (CCAA)[2] and "sparely"[3] granted, adding that the Québec Tariff, especially articles 15 and 42 thereof, ought not to apply in circumstances where the Court has only pronounced on a classification issue arising under a Plan of Arrangement, the reasonableness and fairness of such Plan and the radiation of certain allegations in the Contestation to the application to approve the Plan. They submit that the relief sought and either refused or granted by the judgments ordering costs amount to declaratory judgments where the amount in issue cannot be determined.

3 If the Québec Tariff is to apply at all, the Opposing Creditors submit that the costs due to Uniforêt and Jolina ought to be taxed according to Class II-B[4] thereof; that is as for an action involving amounts of between $3,000. and $10,000. Finally, they submit that the expert fees of Mr. Stadulis, amounting to $149,439., should not be granted as Madame Justice Zerbisias found his expert evidence to be irrelevant.

THE FACTS

4 Counsel for all parties agree that the various proceedings[5] in this matter leading to the ultimate approval of a "Second Amended Plan of Compromise and Arrangement" (Plan) have been hotly contested. The Court observed in its judgment of

May 16, 2003 that:

> [36] The good faith of the Opposing Creditors has been called into question by Madam Justice Zerbisias.[6] The Opposing Creditors assert that Uniforêt "and its allies [...] have shown bad faith of the kind which should convince any reasonable observer that the Plan is neither fair nor reasonable". [...]
>
> [37] Suffice it to say that there has been aggressive behaviour displayed by all the parties in the course of this affair, at least some of the time. The Court has already commented on the transactions impugned by the Opposing Creditors.[7] Absent a bankruptcy, these claims will all be resolved eventually, just like the claims of the Opposing Creditors, either in accordance with their terms or subject to the Plan. [...]
>
> [38] Aggressive behaviour is to be expected in proceedings of this kind. The CCAA favours the survival of businesses and the jobs that go with them. Where, as here, it has been amply demonstrated that the creditors as a whole will fare much better under the Plan than in a liquidation, the solution is obvious. The issue in this case was to decide if a minority group of secured creditors has been materially oppressed by the behaviour of the majority. That case has not been made out. The U.S. noteholders are offered the entire enterprise value of Uniforêt in the form of reconstituted notes and they will receive annual yields on these notes for the next five years varying between some 10% and 17%.

5 The hearing of the classification issue decided by Madame Justice Zerbisias on October 23, 2002 lasted 20 days and resulted in the dismissal of the Opposing Creditors' requests to amend the Plan to, amongst other things, place Jolina in a separate class from that in which the Opposing Creditors were classified, "the whole with costs against Petitioners". Leave to appeal this judgment was refused by Mr. Justice Nuss of our Court of Appeal, also with costs.[8]

6 The hearing leading to the sanction of the Plan lasted 22 days and, like the classification hearing, involved experts opining on a variety of issues ranging from the state of the Canadian forestry industry generally to the business operations of Uniforêt in particular, including as well the market in the United States for Uniforêt's U.S. Secured Notes. Leave to appeal this decision to the Court of Appeal was also refused, also with costs.[9] The Supreme Court of Canada as well declined to hear the matter, with costs.[10]

DISCUSSION

A. Application of the Québec Tariff

7 In CCAA cases where Canadian Courts have exercised their inherent jurisdiction (power) to award costs,11 they have almost always resorted to provincial tariffs to fix the quantum of such costs.12

8 Given the supervisory role exercised by the Courts in CCAA matters where stay applications are frequently submitted only after sometimes lengthy and heated negotiations leading to a consensus between debtors and their creditors, it should come as no surprise that costs are frequently waived. However, Canadian Courts have not hesitated to award costs to a winning party where applications are contested,[13] as in our case. This Court is no different in this respect than other Canadian Courts. And when costs are awarded, the Québec Tariff is applied unless the Court stipulates otherwise.[14] On this issue, the Court is not persuaded that there is any valid or compelling reason why the Québec Tariff should not be applied in this case to the awards of costs that have already been made without any suggestion that they be based otherwise than on the Québec Tariff.

9 Perhaps one valid reason for not applying a provincial tariff to costs awarded in CCAA matters would be to ensure consistency and restraint in the application of the principle that such costs should generally be "sparingly" granted in insolvency matters. However, where as here costs have been ordered to be paid by a minority group of cranky speculators who were found to have over reached in their aggressive attempts to secure a better deal for themselves from a debtor in distress, the application of other principles warrants at the very least equal consideration.[15]

B. The Article 42 1% fee - Amounts in Issue

TAB 21

2018 BCSC 210
British Columbia Supreme Court

BuildDirect.com Technologies Inc. (Re)

2018 CarswellBC 360, 2018 BCSC 210, 288 A.C.W.S. (3d) 632, 57 C.B.R. (6th) 322

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

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

And In the Matter of BuildDirect.com Technologies Inc. (Petitioner)

Sewell J.

Judgment: February 14, 2018
Docket: Vancouver S1710095

Counsel: Danielle Toigo, for Petitioner
Derek J. Bell, Todd M. Shikaze, for In Colour Capital Limited Partnership

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.a General principles

Headnote

Civil practice and procedure --- Costs — Scale and quantum of costs — General principles
In proceedings under Companies' Creditors Arrangement Act (CCAA) it was concluded that petitioner had not entered into binding agreement with partnership to grant licence to use petitioner's intellectual property in Republic of India — Costs submissions received — Costs awarded to petitioner — Parties cooperated in bringing application for hearing on expedited basis — There was no finding of bad faith or improper motive on part of partnership in asserting claim to binding agreement — There should be some special circumstance to warrant order requiring participant in CCAA proceeding to pay other party's actual legal costs — Litigant should only be required to pay special costs if it engaged in reprehensible conduct in litigation — As partnership's claim was not devoid of merit and it advanced claim in good faith, court should be cautious about making award of costs amounting to full indemnity in CCAA proceedings in absence of contractual right to such costs — Amount of costs incurred was substantial, but there was no evidence as to how costs compared to overall costs of proceeding — Claim advanced by partnership would not have attracted award of special costs if it had been brought in normal civil action — It was monitor that brought application, not partnership — Circumstances that matter was summarily decided in CCAA proceedings was not sufficient reason to require partnership to pay more costs than it would have in ordinary civil action — Partnership was to pay party and party costs of petitioner and monitor on scale B.

Table of Authorities

Cases considered by *Sewell J.*:

Calpine Canada Energy Ltd., Re (2008), 2008 ABQB 537, 2008 CarswellAlta 1163, 46 C.B.R. (5th) 243 (Alta. Q.B.) — considered

Jackpine Forest Products Ltd., Re (2004), 2004 BCSC 20, 2004 CarswellBC 87, 49 C.B.R. (4th) 110, 27 B.C.L.R. (4th) 332, 47 C.P.C. (5th) 313 (B.C. S.C.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
Generally — referred to

ADDITIONAL REASONS relating to costs of application determining whether there was binding agreement.

***Sewell J.*:**

1 On November 24, 2017, I gave oral reasons in these *CCAA* proceedings in which I concluded that the petitioner had not entered into a binding agreement with In Colour Capital Limited Partnership ("ICC") to grant a licence to use the petitioner's intellectual property ("IP") in the Republic of India.

2 At the conclusion of those reasons, I gave the parties leave to make submissions with respect to costs.The petitioner made a written application for costs and ICC made written submissions in response.

3 The petitioner seeks an order that ICC pay its costs of the application on a full indemnity basis and an order that ICC indemnify it for amounts it is required to pay for the legal costs of the Monitor, the Senior Lenders and the Interim Lenders, as those entities are defined in the petitioner's costs submissions. Pursuant to orders made in this proceeding and the terms of the agreements between the petitioner and the Senior Lenders and Interim Lenders, the petitioner is obligated to indemnify the Monitor and those Lenders for their legal expenses.

4 The total amount of costs claimed is $136,000.

5 ICC submits that no costs should be awarded, or alternatively that party and party costs only should be awarded to the petitioner.

6 While the underlying dispute on which I ruled was between the petitioner and ICC, the application was brought by the Monitor

7 The Initial Order in these proceedings was made on October 31, 2017. On November 7, 2017, the solicitors for ICC wrote to counsel for the petitioner alleging that before the date of the Initial Order, ICC and the petitioner had entered into a binding agreement whereby the petitioner granted an exclusive licence to ICC to utilize the petitioner's intellectual property in the Republic of India.

8 If such an agreement had been made, it would not have been affected by the proposed re-organization of the petitioner under the *CCAA*. The petitioner and the Monitor were of the view that the right to utilize the IP in India was of considerable value to the petitioner, and that a decision on the issue of whether ICC had an exclusive licence to use the IP in India was necessary in order to proceed with a plan of re-organization or sale.

efforts.

21 Similarly, in *Calpine Canada Energy Ltd., Re*, the court found that the applicant had voluntarily entered the fray to better their position to acquire assets of the debtor.

22 However, in this case, ICC did nothing more than assert a right against the petitioner. The summary proceedings brought by the Monitor were necessitated by the time-sensitive nature of this proceeding. ICC brought no proceedings. I am aware that the nature of the claim made by ICC was of profound importance to successful completion of the SISP process being pursued by the petitioner. However, given the summary nature of the application, I am unable to find that ICC advanced the claim it did for an improper purpose.

23 ICC had the right to assert a claim. While it is unlikely that its claim could have been dealt with under the claims process, it would have been necessary for ICC to obtain leave of the court to lift the stay of proceedings to pursue its claim. ICC did not seek such leave.

24 My review of the authorities relied upon by the petitioner persuades me that there should be some special circumstance to warrant an order requiring a participant in a *CCAA* proceeding to pay the other party's actual legal costs.

25 In British Columbia, the *Supreme Court Civil Rules* empower the court to order a party to pay special costs, which approach full indemnity. However, the law is clear that such an award can only be made for reprehensible conduct in the course of the litigation. I have no doubt that in appropriate circumstances, advancing a meritless claim for a collateral purpose could constitute reprehensible conduct.

26 However, as I have already stated, I did not find that ICC's claim was devoid of merit nor am I able to conclude that it did not advance its claim in good faith. In my view, this court should be cautious about making an award of costs amounting to a full indemnity in *CCAA* proceedings in the absence of a contractual right to such costs. In so doing, the court is in effect awarding costs that would not be available in any other proceeding.

27 There is, of course, no impediment to a court awarding special costs, but I think that the same principles should apply to the making of such an award in all litigation, including *CCAA* proceedings. This is particularly so given the fact that the purpose of an award of special costs is to punish the wrongful party and not to compensate the other party.

28 I am aware that ICC is a sophisticated entity. I also have no doubt that ICC was aware that the claim it advanced would have to be addressed in the SISP process. However, these factors are not decisive of the question of whether to order full indemnity costs in this case.

29 It seems to me that the argument that having the petitioner bear its own legal fees would not further the objectives of the *CCAA* can only be taken so far. There will be cases in which furtherance of the objectives of the *CCAA* will require an order ordering an unsuccessful party to indemnify the petitioner for the full amount of its legal expenses in defending an application. However, to make such an award in all cases would in effect be creating a different costs regime in *CCAA* proceedings than that which governs the court in other matters.

30 In my view, such an order should not be made without specific evidence that it is necessary to prevent material harm to the process of re-organization. In this case, I am not persuaded that an indemnity for these costs is required to avoid such harm.

31 The petitioner's arguments on this issue are general and non-specific. The amount of the costs incurred is substantial, but there is no evidence as to how those costs compare to the overall costs of these proceedings. Further, the claim advanced by ICC was one that would not have attracted an award of special costs had it been brought in a normal civil action.

32 In addition, ICC was not the applicant and the cases relied upon by the petitioner are therefore distinguishable on that ground. I agree that it was appropriate for the Monitor to bring this matter before the court for a decision. However, the fact remains that it was not ICC who made the application.

33 The jurisprudence with respect to costs has established that a litigant should only be required to pay special costs if it engages in reprehensible conduct in the litigation. There was no such conduct on its part in this proceeding. In my view, the circumstance that the matter was summarily decided in a *CCAA* proceeding is not a sufficient reason to require ICC to pay more in costs than it would have in an ordinary civil action.

34 Accordingly, I order ICC to pay the petitioner's costs of the application on Scale B.

35 I am also of the view that the Monitor's costs should be paid by ICC, also on Scale B.

36 The amount of costs will be assessed by the Registrar if the parties cannot agree.

37 There will be no order for costs to the Senior and Interim Lenders. While they were entitled to appear and make submissions, I do not think their appearance was necessary to resolve the issue brought forward by the Monitor. The petitioner's obligation to pay the Lenders' costs should not be passed on to ICC.

38 The costs awarded to the petitioner will include the costs of these written submissions.

Costs awarded to petitioner.

End of Document

TAB 22

2019 ABQB 592
Alberta Court of Queen's Bench

Orbis Engineering Field Services v. Taifa Engineering Ltd

2019 CarswellAlta 1577, 2019 ABQB 592, [2019] A.W.L.D. 3022, [2019] A.W.L.D. 3038, [2019] A.W.L.D. 3039, [2019] A.W.L.D. 3040, [2019] A.W.L.D. 3141, 308 A.C.W.S. (3d) 262

Orbis Engineering Field Services & Spark Power Corp. (Applicants / Plaintiffs) and Taifa Engineering Ltd., Adil Mohamed, Aly Saleh, Geovanni Barone, Frederick Steyn, Amin Kassam, Amir Rahemtulla, XYZ Corporation, John Doe and Kassam Family Trust No. 1 (Respondents / Defendants)

Douglas R. Mah J.

Heard: July 29, 2019
Judgment: August 2, 2019
Docket: Edmonton 1903-11971

Proceedings: additional reasons to *Orbis Engineering Field Services v. Taifa Engineering Ltd* (2019), 2019 ABQB 510, 2019 CarswellAlta 1376, Douglas R. Mah J. (Alta. Q.B.)

Counsel: Pat Robinson, for Applicants / Plaintiffs
James Lingwood, for Respondents / Defendants, Taifa Engineering, Aly Saleh and Frederick Steyn
Anthony Purgas, for Respondents / Defendants, Amin Kassam & Kassam Family Trust No. 1
James Lingwood (agent), for Respondent / Defendant, Adil Mohamed

Subject: Civil Practice and Procedure; Public; Employment

Related Abridgment Classifications

Remedies
II Injunctions
II.8 Practice and procedure
II.8.k Costs
II.8.k.iii Miscellaneous

Headnote

Remedies --- Injunctions — Practice and procedure — Costs — Miscellaneous
Employer was engineering design and field services firm with employees who were bound by restrictive covenants at some point — Employer was sold to parent company S Corp. by principal of employer, who started to work for S Corp. — Principal retained particular telephone that allegedly pre-dated employer's existence and ultimately left S Corp. — Certain employees left employer, and some worked for competitor established by two employees while still working for employer — Employer and S Corp. brought action against principal, employees, and competitor for relief for breach of contract and breach of fiduciary duties — Employer and S Corp. brought unsuccessful application for interim interim injunction restraining principal, employees, and competitor from soliciting employer's clients and staff and for order requiring principal to preserve records and surrender telephone number — Parties made submissions on costs — Employer and S Corp. were ordered to pay 1.5 times Column 5 costs, payable forthwith — Though employer and S Corp. were unable to demonstrate urgency in their application, misapprehended urgency did not meet threshold for awarding of solicitor-client costs — Case was important to parties, but was not on scale for ordering partial indemnity costs of 75 per cent of actual legal bill as sought

by principal, employees, and competitor — Length, scope, and complexity of case did not require inflationary adjustment to costs — Costs order recognized circumstances in which application was brought, outcome, and trouble to which principal, employees, and competitor were put to address application.

Table of Authorities

Cases considered by *Douglas R. Mah J.*:

Athabasca Minerals Inc. v. Syncrude Canada Ltd. (2018), 2018 ABQB 551, 2018 CarswellAlta 1451, 77 Alta. L.R. (6th) 139, 25 C.P.C. (8th) 258 (Alta. Q.B.) — followed

Blaze Energy Ltd. v. Imperial Oil Resources (2014), 2014 ABQB 509, 2014 CarswellAlta 1498 (Alta. Q.B.) — referred to

Echo Valley Farms Inc. v. Alberta (1998), 235 A.R. 394, 1998 CarswellAlta 1414, 45 C.P.C. (4th) 362, 1998 ABQB 561 (Alta. Q.B.) — referred to

HOOPP Realty Inc v. Guarantee Company of North America (2019), 2019 ABQB 104, 2019 CarswellAlta 269 (Alta. Q.B.) — considered

Lac Ste. Anne (County) v. North West Fire Rescue-Onoway Ltd (2018), 2018 ABQB 289, 2018 CarswellAlta 699, 15 C.P.C. (8th) 130, 73 M.P.L.R. (5th) 85 (Alta. Q.B.) — distinguished

Matthews v. Matthews (2017), 2017 ABQB 260 (Alta. Q.B.) — considered

R&R Consilium Inc v. Talbot (2019), 2019 ABQB 275, 2019 CarswellAlta 788 (Alta. Q.B.) — considered

Secure 2013 Group Inc v. Tiger Calcium Services Inc (2018), 2018 ABCA 110, 2018 CarswellAlta 1048, 68 Alta. L.R. (6th) 56, 18 C.P.C. (8th) 325 (Alta. C.A.) — followed

Secure 2013 Group Inc. v. Tiger Calcium Services Inc (2017), 2017 ABCA 316, 2017 CarswellAlta 1856, 58 Alta. L.R. (6th) 209, 417 D.L.R. (4th) 509, 13 C.P.C. (8th) 1 (Alta. C.A.) — referred to

Spar Aerospace Ltd. v. Aerowerks Engineering Inc. (2007), 2007 ABQB 688, 2007 CarswellAlta 1559, 82 Alta. L.R. (4th) 396, 428 A.R. 18 (Alta. Q.B.) — considered

Sutherland v. Encana Corp. (2014), 2014 ABQB 601, 2014 CarswellAlta 1767, 59 C.P.C. (7th) 177, 4 Alta. L.R. (6th) 188, 597 A.R. 230 (Alta. Q.B.) — followed

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 10.33 — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Sched. C, Tariff of Costs, item 1(1) — considered

Sched. C, Tariff of Costs, item 8(1) — considered

Sched. C, Tariff of Costs, column 1 — considered

Sched. C, Tariff of Costs, column 5 — referred to

ADDITIONAL REASONS to judgment reported at *Orbis Engineering Field Services v. Taifa Engineering Ltd* (2019), 2019 ABQB 510, 2019 CarswellAlta 1376 (Alta. Q.B.), respecting costs.

***Douglas R. Mah J.*:**

A. Background

1 My decision denying an interim interim injunction is reported at 2019 ABQB 510 (Alta. Q.B.). As in my previous decision, I refer to Orbis and Spark collectively as Orbis. Orbis settled the costs matter with only one of the Respondents (Mr. Rahemtulla). Everyone else from the original application is back to discuss costs.

2 The remaining successful Respondents take these positions:

- Taifa, Mr. Saleh and Mr. Steyn submit they should receive full or partial indemnity costs, or alternatively 2 x Column 5 costs with a 40% gross-up for inflation;
- Amin Kassam and Kassam Family Trust No. 1 claim enhanced costs of 2 x Column 5 with an inflation factor of 49.12%;
- Mr. Mohamed seeks costs of 2 x Column 5 plus an inflationary adjustment of 40%;
- All the above Respondents insist that costs must be paid forthwith.

3 Orbis, as unsuccessful applicant, says:

- there are good reasons why no costs should be awarded to any of these Respondents, or that costs should be in the cause or payment deferred;
- costs, if any or at most, should be in accordance with Column 1, the normal scale for injunction applications; and
- there is no justification in law to award a separate cost for preparation of an affidavit using Tariff Item 1(1) of Schedule C.

4 The above positions result in nine different issues for decision, with some sub-issues.

5 All parties before me on the costs application agree that the granting of costs is an inherently discretionary matter on the Court's part, provided that discretion is exercised in a principled and rational manner: *Blaze Energy Ltd. v. Imperial Oil Resources*, 2014 ABQB 509 (Alta. Q.B.) at para 66. They also agree that the non-exhaustive list of factors enumerated in Rule 10.33 guide the discretion.

B. Discussion

1. Solicitor-client Costs

6 Taifa, Mr. Saleh and Mr. Steyn say solicitor-client costs are warranted because Orbis brought a non-meritorious interim interim injunction application without effective notice in an attempt to defeat justice. An order of costs on a full indemnity or solicitor-client basis would deter such reckless conduct: *Echo Valley Farms Inc. v. Alberta*, 1998 ABQB 561 (Alta. Q.B.) at paras 3, 9 & 17. and *Secure 2013 Group Inc v. Tiger Calcium Services Inc*, 2018 ABCA 110 (Alta. C.A.) (*Tiger Calcium No. 2*) at para 15.

7 In the present case, Orbis gave notice on Friday afternoon for a Tuesday application. An adjournment was refused by Orbis, which caused the Respondents and their counsel to do some scurrying. When the parties appeared on June 11, 2019 (the Tuesday), Justice Neilson determined a conflict and adjourned the application to June 25, 2019, at which time it was heard by me. This adjournment enabled these and the other Respondents to more fully prepare for the application. Orbis conceded that it would have tried to proceed on June 11, 2019 but for the conflict.

8 These Respondents contend that Orbis attempted, by scheduling a June 11, 2019 application and then refusing to adjourn it, to give notice in name only and thereby escape its duty of candour as required by *Secure 2013 Group Inc. v. Tiger Calcium Services Inc*, 2017 ABCA 316 (Alta. C.A.) at paras 44-46 but at the same time deny the Respondents a meaningful opportunity to respond because of the short notice. These actions were characterized by these Respondents as an attempt to defeat justice.

9 The conflict experienced by Justice Neilson was entirely fortuitous. At any rate, the conduct complained of, litigation by ambush, did not occur as it turned out. To be sure, Orbis was unable to demonstrate urgency before me, but I cannot infer malign intent from these circumstances.

10 As the Court of Appeal notes in *Tiger Calcium No. 2* at para 15, "solicitor-client costs are generally awarded only when there has been reprehensible, scandalous or outrageous conduct" and "only in rare and exceptional circumstances." I find that misapprehended urgency does not meet that threshold, although it may meet another threshold such as for enhanced costs of another kind.

2. Partial Indemnity Costs

11 In the alternative, Taifa, Mr. Saleh and Mr. Steyn seek partial indemnity of 75% of the actual legal bill incurred in defending the application, citing *Athabasca Minerals Inc. v. Syncrude Canada Ltd.*, 2018 ABQB 551 (Alta. Q.B.).

12 I appreciate the thoughtful and considered approach taken by Jones J in that case who awarded 45% of the successful party's actual legal costs. However, I have concluded that *Athabasca Minerals Inc.* is a different type of case in both complexity and intensity. That case involved a two-day application with significant preparation during a compressed time-frame, a significant amount of materials including extensive affidavits, transcripts from questioning and responses to undertakings. Five days of reading time had been allocated to the judge to review the material.

13 While the present case is important to the parties before me, it is not in my view on a scale that would compel me to order partial indemnity as in *Athabasca Minerals Inc.*.

3. Inflationary factor

14 Much of the argument before me regarding enhanced costs on the part of the remaining Respondents was in the nature of plaintive lament of the inadequacy of Schedule C. Adjusting by inflation is one method of addressing inadequacy. However, as I said at the hearing, an equal argument can be made in every case and every proceeding before the Court that the successful party should receive an inflationary adjustment, including in every morning chambers application. That is not practical.

15 I realize that this Court in cases such as *R&R Consilium Inc v. Talbot*, 2019 ABQB 275 (Alta. Q.B.) at para 70 and *Spar Aerospace Ltd. v. Aerowerks Engineering Inc.*, 2007 ABQB 688 (Alta. Q.B.) at paras 16 & 18 endorsed both an inflationary adjustment on costs and the use of a standard inflation calculator. However, I prefer the view adopted by Michalyshyn J in *Sutherland v. Encana Corp.*, 2014 ABQB 601 (Alta. Q.B.) at paras 71-73 that the use of Schedule C makes for some consistency in a discretionary system and that the quantum of the tariff is a matter for lawmakers. Further, I remain unconvinced that this case by its length, scope or complexity requires an inflationary adjustment.

16 Accordingly, I decline to do so here.

4. Why not Column 1?

