

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 5248
COURT FILE NO.: CV-14-507120
DATE: 20150826

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio and Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and Andrew Carlson, for the Defendant, West Face Capital Inc.

Robert A. Centa, Kristian Borg-Olivier and Denise Cooney, for the Defendant, Brandon Moyse

COSTS ENDORSEMENT

Overview

[1] By endorsement, dated July 7, 2015 (the “Endorsement”), I dismissed (i) Catalyst’s¹ motion seeking a Voting Injunction and an Imaging Order against West Face, and (ii) Catalyst’s motion seeking a Contempt Order against Moyse.

[2] Pursuant to the Endorsement, all parties delivered written costs submissions, including relevant authorities, which I reviewed.

[3] West Face seeks partial indemnity costs of \$175,000, plus \$37,347.68 in disbursements (all inclusive of HST). Moyse seeks partial indemnity costs of \$110,000, plus \$21,602.32 in disbursements (all inclusive of HST). Both defendants seek costs payable by Catalyst within 30 days of this order.

[4] Catalyst submits that only a portion of the defendants’ costs should be fixed, and should be made payable in any event of the cause. Catalyst further submits that Moyse’s costs should be reduced since it was his conduct in deleting his personal browsing history that led to the motion for the Contempt Order.

¹ All defined terms are as set out in the Endorsement.

[5] Catalyst further submits that the defendants' costs and some of West Face's disbursements are excessive and unreasonable.

[6] I address these issues below.

Analysis

Issue 1: Should only a portion of costs be fixed and made payable in any event of the cause?

[7] Catalyst submits that "most, if not all" of the evidence produced by the defendants in responding to the motion for the Voting Injunction, Imaging Order, and Contempt Motion is relevant to the issues at trial of (i) whether West Face misused Catalyst's confidential information and if so, the appropriate remedy for West Face's misconduct, and (ii) whether Moyse wrongfully retained Catalyst's confidential information following his resignation from Catalyst and whether any of this information was communicated to West Face.

[8] Consequently, Catalyst submits that (i) the portion of the costs which relates to trial evidence should not be ordered by this court as costs on the motion, as the trial judge will need to determine the successful party, and that party will receive its costs of the action; and (ii) the limited portion of the costs related only to the motions (for West Face, "no more than \$30,000" and for Moyse, "no more than \$20,000") be ordered payable in any event of the cause.

[9] The defendants rely on the general presumption under Rule 57.03(1) that costs of a contested motion are to be fixed by the court and paid within 30 days.

[10] Further, the defendants rely on the decisions of Conway J. in *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2008] OJ 374 (SCJ) ("*Longyear*") and McKinnon J. in *Cana International Distributing Inc. (c.o.b. as Sexy Living) v. Standard Innovation Corp.*, 2011 ONSC 752 (SCJ), in which the courts set out the general principle that costs on an unsuccessful interlocutory injunction should be payable forthwith to the defendants.

[11] In *Longyear*, Conway J. distinguished between injunctions on which the plaintiff was successful (in which case costs would generally not be payable forthwith) and those in which the defendants were successful (in which cases costs would generally be payable forthwith). Conway J. held (*Longyear*, at paras. 7-10):

As the defendants point out, there is a distinction between the cases cited by Boart, where the plaintiff had been successful on the interlocutory injunction, and the case where the defendant has successfully resisted the injunction motion, as in the one before me. The reasoning behind this distinction is well articulated by Sharpe in *Injunctions and Specific Performance*, 2nd Edition (looseleaf), Toronto, Canada Law Book, 2006, at pp. 2-106:

Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith ... On the other

hand, it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the questions of costs to the trial judge.

The rationale for deferring the costs decision does not apply where an injunction is denied. Whether or not this case proceeds to trial, and indeed even if Boart succeeds at trial, it does not follow that Boart was ever entitled to interlocutory relief. This extraordinary remedy is based on additional factors apart from the overall merits of the case. I determined that Boart could not meet the irreparable harm and balance of convenience criteria. I see no reason why Boart's inability to satisfy the injunction test should disentitle the defendants from receiving their costs at this point.

Rule 57.03(1)(a) of the *Rules of Civil Procedure* sets out the normal requirement for costs of a motion, namely that the court fix the costs of the motion and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just.

There is nothing in my mind which makes it more just to depart from the usual rule, nor has Boart provided me with any substantive reasons to do so. The defendants were completely successful on the motion. The trial may or may not proceed. The defendants are entitled to their costs of this motion, as they would be on any other motion brought before trial. Costs should be fixed and payable within 30 days.

[Emphasis added.]

[12] I adopt the above analysis of Conway J. in *Longyear*.

[13] If the court were to defer costs of an injunction related to the factual and legal merits of the action, the unsuccessful defendant would not be entitled to costs reasonably incurred to address those issues even when, as in *Longyear*, the “extraordinary remedy is based on additional factors apart from the overall merits of the case”.

[14] By way of example, a plaintiff who seeks an injunction without providing an undertaking or satisfying the requirements of irreparable harm or balance of convenience, still obligates the defendant to review all of the relevant evidence to address the first requirement of a serious question to be tried. In such a case, the motion for injunctive relief could fail regardless of the merits of the action.

[15] In such circumstances, it is likely that the defendant's costs of preparing responding motion material on the merits would have (in some part) been costs incurred to prepare for trial. If the plaintiff had not brought the injunction, a successful trial defendant would obtain those costs at trial and an unsuccessful defendant would not be entitled to those costs.

[16] However, if the plaintiff chooses to bring an injunction and does not succeed, the unsuccessful defendant at the motion is still required to prepare on the issue of the merits (on the “serious question” test), and there is no certainty that the action will proceed to trial. Even if the action proceeds to trial, the fact that some evidentiary review may later be avoided by counsel (without considering all of the time required for an injunction to set out the evidence and documents in affidavit form) is not a reason to defer that portion of costs to the trial judge. A successful defendant at trial cannot claim twice for the review. An unsuccessful defendant at trial still incurred the costs of evidentiary review in response to the injunction, and ought to be entitled to those costs forthwith regardless of the result at trial.

[17] In the present case, I found that Catalyst had not satisfied the requirements of an undertaking, irreparable harm, or balance of convenience and, as such, was not entitled to injunctive relief. West Face was required to conduct a thorough review of the evidence to address the merits of the action, and those costs were reasonably incurred in response to the motion. West Face is entitled to those costs even if some unidentified portion of those costs related to evidentiary review that might also have been required if a trial takes place.

[18] With respect to the Contempt Motion, I accept the submissions of Moyse that the issue before the court was whether Moyse was in contempt of the Consent Order. The issue before the court at trial will be whether Moyse took confidential information with him when he left Catalyst and whether he passed that information on to West Face. Consequently, I do not accept Catalyst’s submission that “[m]ost if not all of the evidence produced by the parties” with respect to the Contempt Motion “will form part of the trial record”. Even if some of the evidentiary review will be relevant to trial, Moyse is still entitled to such costs to respond to the motion for the reasons I set out above.

[19] For the above reasons, I do not defer any of the costs (let alone the significant percentage sought by Catalyst) to trial. The defendants are entitled to payment of costs forthwith.

Issue 2: Should Moyse’s conduct in deleting his personal browsing history be relevant to costs?

[20] I agree with Catalyst’s submission that Moyse’s conduct in deleting his personal browsing history is a relevant factor for costs since he “bears some responsibility for the contempt proceeding being brought against him”.

[21] Moyse’s counsel submits that “the amount Mr. Moyse seeks is significantly less than his actual costs, and less than he would normally be expected to seek in partial indemnity costs” since “[the reduced amount] also reflects Mr. Moyse’s recognition that he could have protected his legitimate privacy concerns in ways that would have reduced the likelihood of Catalyst responding in the way that it did”.

[22] Consequently, both parties agree that Moyse’s conduct in deleting his personal browsing history after the Consent Order is relevant to costs, although Moyse submits that the amount he is seeking for costs reflects this reduction.

[23] Under Rule 57.01(i), the court can consider any other matter relevant to costs. The Contempt Motion would not have been brought if Moyse had not deleted his personal browsing history the day before he was scheduled to deliver his computer under the Consent Order. While I accepted Moyse's submission that such conduct did not constitute contempt of court, I do consider his conduct when I assess costs below.

Issue 3: What are the reasonable costs incurred by the defendants?

[24] All parties rely on the decision of the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (CA) ("*Boucher*"), in which the Court set out the principle that "the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant" (*Boucher*, at para. 24) and that "the expectation of the parties concerning the quantum of a costs award is a relevant factor" (*Boucher*, at para. 38).

[25] All of the parties submitted a costs outline at the hearing, as required under Rule 57.01(6). On a partial indemnity scale (inclusive of taxes and disbursements), (i) Catalyst sought costs of \$106,551.17; (ii) Moyse sought costs of \$144,204.73; and (iii) West Face sought costs of \$290,338.30.

[26] In their written costs submissions, Moyse sought costs of \$110,000 on a partial indemnity scale, plus disbursements of \$21,602.32 (inclusive of taxes), while West Face sought costs of \$175,000 on a partial indemnity scale, plus disbursements of \$37,347.68 (inclusive of taxes).

[27] Under Rule 57.01, the court can consider a list of factors (including any other matter relevant to costs). I address the relevant factors below.

[28] **The importance of the issues:** The consequences of the motions for both West Face and Moyse were significant.

[29] With respect to the Voting Injunction, Catalyst sought to prevent West Face from exercising its voting rights in WIND until trial of the action. Further, as initially framed, Catalyst also sought to forbid West Face's participation in the AWS-3 spectrum auction, which Mr. Riley described as a "unique, one-time, extremely valuable opportunity".

[30] Further, Catalyst's initial request for the Imaging Order sought to have the ISS forensically image over 172 West Face devices.

[31] With respect to the Contempt Order, Catalyst sought an order against Moyse (a) declaring that he was in contempt of court, (b) committing him to jail for a period to be determined by the court, and (c) in addition or in the alternative, that he be fined in an amount to be determined by the court.

[32] Given that Catalyst sought to enjoin West Face from voting a significant interest in a major asset, and put Moyse's liberty, reputation and integrity at stake, the defendants had no choice but to vigorously oppose the motions.

[33] **The complexity of the issues:** I do not find that the legal issues in the motion were complex. Catalyst and Moyse relied on settled case law dealing with the law of contempt, and the law relating to injunctive relief is also well-established.

[34] There was complexity in relation to some of the factual issues addressed by the parties. Catalyst accused West Face of using misappropriated confidential information to engage in three transactions (WIND, Callidus, and Arcan). Consequently, West Face was required to review all of the necessary evidentiary record with respect to the hiring of Moyse, its acquisition of WIND, its investment in Arcan, and its Callidus research. Moyse was required to retain a forensic computer expert to address whether Moyse had breached the Consent Order.

[35] **The results of the motion:** Both defendants were fully successful on the motion. Further, I agree with Moyse that Catalyst pursued the Contempt Motion even after its expert had acknowledged that there was no evidence Moyse had run the "Secure Delete" program, and without any evidence that Moyse had deleted Dropbox information from his personal computer.

[36] **The amount an unsuccessful party would reasonably expect to pay/Quantum of costs:** Catalyst raises several issues with respect to the quantum of costs sought by the defendants to submit that the costs sought are not the amount an unsuccessful party would reasonably expect to pay. Catalyst submits: (i) costs were increased as both counsel were newly retained for the motions; (ii) costs were excessive due to duplication, excessive hours, and multiple timekeepers; (iii) costs were dramatically more than the costs incurred in the Interim Injunction; (iv) disbursements of over \$27,000 for West Face's information technology expert relate to matters at issue in the trial; and (v) West Face's photocopying expenses of \$7,354.35 are almost twice that of Moyse and Catalyst combined.

[37] I agree with the submission of West Face and Moyse that the motion was "high stakes" and, as such, an unsuccessful party would reasonably expect both West Face and Moyse to vigorously oppose the motion and ensure that all of the available evidence and law was before the court.

[38] On the other hand, it was evident from the costs outlines handed to the court at the hearing that much more time was spent by counsel and other timekeepers for West Face (when West Face only had to address the Voting Injunction and Imaging Order) than by counsel for Catalyst, who prepared material for all of the motions.

[39] I accept the submissions of West Face that it had to respond to Catalyst's allegations, which could require significant work to prepare a full response. I also accept that West Face's request for \$175,000 in fees (including HST) as compared to the actual partial indemnity fees of approximately \$250,000 (including HST) reflects some deduction for some additional time needed as new counsel.

[40] However, the discrepancy between the time charged by counsel and costs attributed to quickly prepare as new counsel are factors in the overall assessment of an amount an unsuccessful party would reasonably expect to pay.

[41] **Relevant case law:** The applicable costs for any motion depend on the facts of the particular case. Nevertheless, I take some guidance from the following cases of costs ordered on a partial indemnity scale, which also involved high-stakes litigation seeking injunctive relief.

[42] In *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, [2007] OJ 2137 (SCJ), at para. 15, Cumming J. ordered approximately \$81,000 in costs (inclusive of GST and disbursements) for the injunction motion (and a similar amount for a cross-motion).

[43] In Justice Lederer's earlier decision on the Interim Injunction (*Catalyst Capital Group Inc. v. Moyse*, [2015] OJ 1080 (SCJ)), the court ordered costs of the one-day injunction in the cause in the amount of \$75,000.

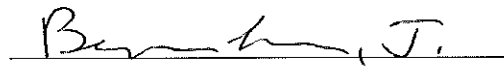
[44] In *Longyear*, Conway J. ordered costs of a one-day injunction motion for the two primary defendants in the amount of \$80,000 and \$75,000, respectively, inclusive of GST and disbursements.

[45] **Summary:** The litigation on both the injunctive relief (for West Face) and the contempt order (for Moyse) was hard-fought and high stakes. It was reasonable to expect that the responding parties would consider all relevant evidence and ensure that a full record was before the court. Further, the fact review necessary to address the "serious question to be tried" test or whether Moyse was in contempt required some detailed analysis and (in the case of Moyse) assistance from forensic experts.

[46] Nevertheless, the legal issues before the court were not complex. While the volume of material was significant, it is not unusual for a full-day injunction similar to those considered by other courts in the cases cited above. Further, a costs award must take into account that new counsel were retained by both parties for the motions, and that Moyse's conduct in deleting his personal browsing history on the day prior to delivering his computer contributed to the bringing of the Contempt Motion.

[47] I also accept that the photocopying disbursements claimed by West Face are excessive and that much, if not all, of the disbursements of West Face's information technology expert (for collecting and imaging data) relate to issues in the litigation and are not disbursements of the injunction.

[48] Given all of the above factors, I fix costs in favour of West Face in the amount of \$90,000 (inclusive of disbursements and taxes) and in favour of Moyse in the amount of \$70,000 (inclusive of taxes and disbursements), payable by Catalyst to the defendants respectively within 30 days of this order.


GLUSTEIN J.

Date: 20150826