Court File No. CV-14-507120

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/Responding Parties

**REPLY COSTS SUBMISSIONS OF THE RESPONDING PARTY WEST FACE CAPITAL INC.**
**(Re: Plaintiff's Motion for Interlocutory Relief heard July 2, 2015)**

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## PART I - WEST FACE IS NOT SEEKING INDEMNIFICATION FOR "ALL" OF ITS COSTS

1. Catalyst submits that the costs sought by West Face are not fair and reasonable because "the defendants cannot seek indemnification for **all** of their time and disbursements" and because costs awards must not reflect the "actual costs incurred by the successful litigant".

2. West Face is not seeking indemnification for anything close to all of its costs and disbursements. As set out in its costs submissions, West Face seeks costs of only $175,000 (inclusive of HST). This figure is only 69% of the $252,990.62 in partial indemnity fees (plus HST) that West Face included in its costs outline.

3. Moreover, the $252,990.62 sum represents less than 40% of the actual expenses that West Face incurred, and West Face deliberately omitted substantial costs that it incurred from its costs outline. For example, and contrary to Catalyst's speculation that West Face seeks indemnity for time incurred for new counsel to "get up to speed", West Face significantly discounted Davies' fees, and did not include any of the substantial time incurred by Dentons.

4. While Catalyst complains that the costs sought by West Face exceed its own costs on this motion or the 2014 motion before Lederer J., West Face had more to do and more at stake. The motion before Justice Lederer was for an injunction and an ISS process against one employee. This motion was for an injunction and an ISS process against an investment to which West Face has committed a significant amount of its investors' capital. West Face's fiduciary duties to its investors demanded that it vigorously and thoroughly defend its right to participate in the management of WIND, and the AWS-3 auction.

5. As a result, West Face was forced to review and produce voluminous evidence responding to Catalyst's bald allegations.[1] None of this time was superfluous or excessive in light of the stakes. For example, Megan Cheema, the law student, reviewed for confidentiality and privilege the over 1000 emails on West Face's servers that were sent to or from Mr. Moyse, as well as the hundreds of West Face documents accessed by Mr. Moyse. Kevin Greenspoon had worked on the WIND transaction and so helped reconstruct that deal in Mr. Griffin's affidavit in response to Catalyst's unfounded allegations. Anthony Alexander is a research partner who coordinated and directed the extensive legal research necessary to answer Catalyst's numerous allegations.

## PART II - WEST FACE'S COSTS SHOULD BE PAID WITHIN 30 DAYS

6. Catalyst argues that West Face's costs should be fixed now, but made payable in any event of the cause, because "[m]ost of the matters at issue … will ultimately be determined at trial". This premise is false, and similar arguments have been repeatedly rejected by the Ontario Courts following unsuccessful motions for interlocutory relief.

7. The starting point for the timing of a costs award is Rule 57.03(1).[2] This Rule provides a presumption that, on a contested motion, costs are to be fixed by the Court and paid within 30 days. While costs will often be ordered in the cause or left to the trial judge where a plaintiff is *successful* in obtaining an interlocutory injunction, where the motion is denied, the defendant is typically entitled to costs within 30 days in accordance with Rule 57.01.

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1 Paragraph 56 of the Endorsement.

2 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.03(1).

8. Costs of interlocutory motions are typically awarded forthwith where relief is denied because the reasons for denial turn on factors like irreparable harm and the undertaking as to damages, which will not be revisited at trial. Justice Conway elaborated on this point in the *Longyear* case cited in West Face's primary costs submissions:

> The rationale for deferring the costs decision does not apply where an injunction is denied. Whether or not [the] case proceeds to trial, and indeed even if [the Plaintiff] succeeds at trial, it does not follow that [the Plaintiff] was ever entitled to interlocutory relief. [This is because the] extraordinary remedy is based on additional factors apart from the overall merits of the case.[3]

9. Similarly, in *Cana International Distributing Inc. (c.o.b. as Sexy Living) v. Standard Innovation Corp.*, Justice McKinnon stated:

> In my opinion, absent extraordinary circumstances, costs on an unsuccessful interlocutory injunction should be payable forthwith. An application for an injunction is a discrete legal remedy involving substantial costs. There is no reason that costs should not follow the event where the application is unsuccessful. There is never an assurance that there will be a trial, particularly in circumstances where an injunction is not in place.[4]

10. These principles apply squarely to Catalyst's unsuccessful motions for the Management Injunction and the *Anton Piller* Order, particularly given that:

(a) the Management Injunction should never have been brought because of: (i) Catalyst's failure to provide an undertaking as to damages as required by Rule 40.03;[5] and (ii) there being no evidence of irreparable harm;[6] and

(b) the *Anton Piller* Order was premature and there was "no evidence that West Face ha[d] failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations".[7]

11. In conclusion, even if Catalyst is successful at trial (which remains to be seen), it does not follow that West Face should be disentitled to its costs in successfully defending against the two extraordinarily invasive forms of interlocutory relief sought by Catalyst. West Face should be awarded its $175,000 in costs (including HST), plus $37,347.68 in disbursements, payable within 30 days.

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3 *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2008] O.J. No. 374 at para. 8 (S.C.J.). See also Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf ed. (Toronto: Canada Law Book, 2014) at para. 2.1330.

4 [2011] O.J. No. 461 at para. 7 (S.C.J.). The rationale for deferring the costs decision to the trial judge following a successful injunction motion was explained by Justice Perrell in *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 2563 at para. 10 (S.C.J.).

5 Paragraphs 8-30 of the Endorsement.

6 Paragraphs 31-38 of the Endorsement.

7 Paragraph 52 of the Endorsement.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11th day of August, 2015.

Davies Ward PHILLIPS & VINEBERG LLP
MATTHEW MILNE-SMITH / ANDREW CARLSON

Lawyer for the Defendant, West Face Capital Inc.

# SCHEDULE A

**SCHEDULE A**
**LIST OF AUTHORITIES**

1. *Cana International Distributing Inc. (c.o.b. as Sexy Living) v. Standard Innovation Corp.*, [2011] O.J. No. 461 (S.C.J.).

2. *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2008] O.J. No. 374 (S.C.J.).

3. *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 2563 (S.C.J.).

4. Sharpe, Robert J., *Injunctions and Specific Performance*, loose-leaf ed. (Toronto: Canada Law Book, 2014).

# TAB 1

*Case Name:*

# Cana International Distributing Inc. (c.o.b. as Sexy Living) v. Standard Innovation Corp.

**Between**
**Cana International Distributing Inc., c.o.b. as Sexy Living,**
**Plaintiff, and**
**Standard Innovation Corporation, Defendant**

[2011] O.J. No. 461

2011 ONSC 752

Court File No. 10-49230

Ontario Superior Court of Justice

**C.D.A. McKinnon J.**

February 2, 2011.

(11 paras.)

**Counsel:**

Howard J. Wolch, for the Plaintiff.

Peter Mantas and Alexandra Logvin, for the Defendant.

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## ENDORSEMENT AS TO COSTS

**1** **C.D.A. McKINNON J.**:-- I have had the opportunity to consider the costs submissions of the parties following the Plaintiff's unsuccessful application for an interlocutory injunction.

**2** The Plaintiff invites me to reserve costs to the trial judge, citing Sharpe J.A. in his text *Injunctions and Specific Performance*, in which he states at Section 2.1330:

> Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith. It has been held that where the motion was groundless and based upon unfounded allegations of fraud, deceit and conspiracy, it may be appropriate for the court to fix the costs on a substantial indemnity scale and require that they be paid forthwith. On the other hand, it

> would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial ... [emphasis added]

**3** Counsel for the Plaintiff emphasizes the discretionary aspect of awarding costs and cites a number of cases in which costs were reserved to the trial judge, including *Kitchen Tire & Bradd Automotive (1989) Ltd. v. Mikula Investments Inc.*, [1994] O.J. No. 2129 (S.C.J.) and *Can-Rad Beauty Ltd. v. Lester*, [1992] O.J. No. 804 (O.C.G.D.). It must be noted that in *Kitchen Tire*, the applicant was successful in obtaining an interlocutory injunction.

**4** In *Can-Rad*, the applicant was unsuccessful and the motion judge reserved the issue of costs to the trial judge. On a request to reconsider and order costs payable forthwith, the learned judge was referred to the case of *Axton and Palmas v. Kent, Wooley, Dale & Dingwall and Martin* (1991), 2 O.R. (3d) 797, in which Campbell J. stated, "It is a salutary practice to order costs payable forthwith on interlocutory matters unless the justice of the case suggests otherwise." Notwithstanding, the motion judge maintained his original order with the condition that if the case did not proceed to trial, costs in an amount fixed by him should be paid by the applicant.

**5** The Defendant cited a number of cases supporting the awarding of costs payable forthwith when an application for injunction is unsuccessful, including *Longyear Canada v. 897173 Ontario Inc. (cob J.N. Precise)*, [2008] O.J. No. 374 (S.C.J.) in which Conway J. stated at para. 8:

> 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 [the plaintiff] Boart succeeds at trial, it does not follow that Boart was ever entitled to interlocutory relief ... I see no reason why Boart's inability to satisfy the injunction test should disentitle the defendants from receiving their costs at this point.

**6** The same result was reached in *Diagnostic Imaging International Corp. v. Quinte Magnetic Resonance Imaging Inc.*, [2010] O.J. No. 1536 (S.C.J.).

**7** In my opinion, absent extraordinary circumstances, costs on an unsuccessful interlocutory injunction should be payable forthwith. An application for an injunction is a discrete legal remedy involving substantial costs. There is no reason that costs should not follow the event where the application is unsuccessful. There is never an assurance that there will be a trial, particularly in circumstances where an injunction is not in place. I agree with the submission of the Defendant that the general approach in the recent caselaw is that when a plaintiff seeking an injunction is unsuccessful, costs should be ordered paid forthwith, in any event of the cause.

**8** With respect to quantum, the Plaintiff submitted that in the event costs are ordered to be paid forthwith, the amount sought by the Defendant, calculated on a partial indemnity scale, is "too high." The Defendant seeks costs in the amount of $30,839.54. The Plaintiff submits that it should only be required to pay $15,000.

**9** With respect to that submission, I note that in the Costs Outline submitted for the motion that was heard over two days submitted by the unsuccessful Plaintiff amounted to $51,689.37, on a partial indemnity basis.

**10** Given the costs submission of the Plaintiff in the event it was successful, I am satisfied that the costs sought by the Defendant are fair and reasonable.

**11** An order will issue requiring the Plaintiff to pay costs to the Defendant fixed in the amount of $30,839.54 inclusive of GST and disbursements, forthwith and in any event of the cause.

C.D.A. McKINNON J.

cp/e/qlrpv/qlvxw/qlced

# TAB 2

*Case Name:*

# Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)

**Between**
**Longyear Canada, ULC (formerly Boart Longyear Inc.) and Boart Longyear Alberta Limited carrying on business in partnership as Boart Longyear Canada and Boart Longyear International Holdings, Inc., Plaintiffs, and 897173 Ontario Inc., carrying on business as J.N. Precise, Joseph Michael Guido, Kenneth John Perrin, Steven Hans Boesche, Donald Daniel Cappadocia, Sandvik Mining and Construction Canada Inc., and Sandvik AB, Defendants**

[2008] O.J. No. 374

164 A.C.W.S. (3d) 406

Court File No. 07-CV-342938 PD3

Ontario Superior Court of Justice

**B.A. Conway J.**

Heard: December 3, 2007.
Judgment: February 5, 2008.

(36 paras.)

*Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Particular orders -- Party and party or partial indemnity -- Particular circumstances -- Interlocutory proceedings -- Assessment of costs after plaintiff's application for an interlocutory injunction to restrain the sale of the defendant's assets and for the other relief was dismissed -- Defendants sought costs on a substantial indemnity basis; plaintiff argued that costs should be either in the cause or reserved to the trial judge -- Costs of $185,000 awarded on a partial indemnity basis -- The defendants were completely successful, and so were entitled to costs, but not on a substantial indemnity basis.*

Assessment of costs after Longyear's application for an interlocutory injunction to restrain the sale of the JNP assets and for the other relief was dismissed -- Longyear argued that costs of the

unsuccessful injunction motion should be either in the cause or reserved to the trial judge -- JNP et al sought costs of $462,208 on a substantial indemnity basis -- HELD: Costs of $185,000 awarded to JNP et al -- JNP et al were completely successful on the motion and were entitled to their costs of the motion, as they would be on any other motion brought before trial -- However, costs on a substantial indemnity basis were not warranted -- Longyear's conduct in bringing the motion was not itself a basis for substantial indemnity costs, nor did the circumstances of the motion warrant the court's reprobation -- There were serious issues for trial -- The fact that Longyear was unable to meet the irreparable harm and balance of convenience tests was not sufficient to impose a higher scale of costs.

**Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 57.03(1)(a)

**Counsel:**

*John A. Campion* and *Berkley D. Sells*, for the plaintiffs.

*John C. Hubble* and *Michael D. McWilliams*, for the defendants 897173 Ontario Inc. (cob. as J.N. Precise) and Joseph Michael Guido.

*Douglas Harrison, Eliot N. Kolers* and *Alexander D. Rose*, for the defendants Sandvik Mining and Construction Canada Inc.

*Robert J. McComb*, for the defendants Kenneth John Perrin and Donald Daniel Cappadocia.

*Aaron K. A. Peterkin*, for the defendant Steven Hans Boesche.

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## ENDORSEMENT ON COSTS

B.A. CONWAY J.:--

### Introduction

**1** On December 10, 2007, I released my Reasons for Decision dismissing Boart's motion for an interlocutory injunction restraining the sale of the JNP assets to Sandvik and for the other relief claimed by Boart.

**2** In paragraph 85 of my reasons, I said that if the parties were unable to agree on costs, written submissions could be made to me. I have now received and reviewed those cost submissions.

**3** I required that the submissions not exceed 3 pages, double spaced, from the defendants (on a collective basis) and from Boart. The defendants adhered to these requirements in both their initial and reply submissions. Boart, however, delivered responding submissions which were 13 pages in length, citing the nature of the issues to be addressed and the magnitude of the cost awards sought by the defendants.

**4** I was well aware of the issues and the potential of large cost amounts when I set the 3 page limit. If the defendants, collectively, were able to respect that limit, Boart should have been able to deliver submissions that were not more than 4 times the size of that limit.

**5** Having made that preliminary comment, I will address the substance of the issues raised in the submissions.

**Payment of Costs on a Contested Motion**

**6** Boart argues that costs of the unsuccessful injunction motion should be either in the cause or reserved to the trial judge. As its primary authority, it cites *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd*. [1994] O.J. No. 1087 (Ont. Gen. Div.), as well as several other cases which followed *Rogers*, for the proposition that there are different considerations which apply to costs on motions for interlocutory injunctions and that where the trial is a virtual certainty, other alternatives to fixing costs may be considered.

**7** 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.

**8** 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.

**9** 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.

**10** 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.

**Scale of Costs**

**11** The defendants seek costs of $462,208.57 on a substantial indemnity basis. I do not consider substantial indemnity to be an appropriate scale in this case.

**12** Substantial indemnity costs are to be awarded in rare and exceptional circumstances. The court generally requires evidence of reprehensible, scandalous or outrageous conduct on the part of one of the parties (*Joy Estate v. 1156653 Ontario Ltd*. [2007] O.J. No. 4396 (S.C.J.) at paras. 31-32). Costs on this higher scale can also be awarded where there are unfounded allegations of

improper conduct or illegality seriously prejudicial to the character or reputation of the party, or where there are unproven allegations of breach of fiduciary duty. These types of costs are typically awarded to signify court disapproval of a litigant's conduct (*Joy*, at para. 34).

**13** In all of the cases cited by the defendants, there was conduct by a party that the court was specifically criticizing (abandoning allegations at the last moment, as in *Joy* and *Henry Schein Arcona Inc. v. Mullin* [2000] O.J. No. 3733 (S.C.J.); bringing the motion for inappropriate tactical reasons, as in *Homelife Realty Services Inc. v. Homelife Performance Realty Inc.* [2005] O.J. No. 4125 (S.C.J.); bringing a motion without merit and using the timing for tactical purposes, as in *Jazz Air LP v. Toronto Port Authority* [2007] O.J. No. 809 (Ont. Div. Ct.); bringing a motion where there were no arguable issues for trial, as in *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126 (Ont. Gen. Div.).

**14** I do not consider that Boart's conduct in bringing the motion was itself a basis for substantial indemnity costs, nor do I consider that the circumstances of the motion warrant the court's reprobation. In my reasons, I did find that there were serious issues for trial. Whether or not these can be proven will be a matter for trial, but there has been no finding that they are groundless or without merit, as in the *Apotex, Henry Schein* and *Jazz* cases, respectively. The fact that Boart was unable to meet the irreparable harm and balance of convenience tests is not sufficient to impose a higher scale of costs.

**15** I will award costs on a partial indemnity scale.

**Quantum of Costs**

**16** The real concern in this case is the quantum of costs sought by the defendants. The combined amount being claimed by the defendants is $343,170.87 (inclusive of GST and disbursements), even on the lower partial indemnity scale. The breakdown of these costs is set out below:

| Defendant | Fees | Disbursements | Total (including GST on fees and disbursements) |
|---|---|---|---|
| JNP and Guido | $129,277.00 | $ 6,990.83 | $144,436.28 |
| Sandvik defendants | $101,346.00 | $21,475.69 (this includes $16,994.15 in travel costs for attending cross-examinations in England) | $122,821.69 |

| | | | |
|---|---|---|---|
| Boesche | $ 10,245.00 | $ 951.62 | $ 11,823.42 |
| Perrin and Cappadocia | $ 55,110.00 | $ 2,208.80 | $ 64,089.48 |
| TOTAL | $295,978.00 | $31,626.94 | $343,170.87 |

**17** I have considered the arguments of the defendants supporting their claim. They argue that Boart brought an aggressive interlocutory injunction motion to restrain the proposed sale transaction and the employment of the individual defendants by Sandvik. The asset sale was scheduled to close on January 1, 2008. Given the high stakes, the defendants had to defend the motion with all their resources. In particular, the defendants point to the following factors:

(a) The injunction was brought on an urgent basis. All activity on the motion was done on an extremely tight time frame over the course of one month.
(b) Boart sued 7 parties with 4 distinct sets of interests and it could have expected that there would be multiple sets of counsel (in fact, there were 4).
(c) There were 7 affidavits delivered by Boart. Boart demanded extensive documentary production.
(d) Boart must have expected that responding affidavits would have to be prepared by the defendants and that cross-examinations would have to be conducted. There were 11 cross-examinations which took place on 8 different days. Boart had at least 2 counsel at every cross-examination whereas the defendants generally only had one lawyer attend and in some cases none.
(e) Boart did not have regard for any efficiencies in the litigation process. It required the Sandvik representatives to fly from Australia and Sweden to London for cross-examinations rather than doing them by video conference. Sandvik's lawyers had to travel to London for these cross-examinations as well. One of the cross-examinations only lasted 2 hours.
(f) Boart was asked by the defendants to produce its dockets and refused to disclose them. The defendants argue that this suggests that Boart spent an equivalent amount on the motion and that the defendants' costs reflect the level that Boart could reasonably have expected to pay as the unsuccessful party on the motion.

**18** I accept all of these factors. I also accept that under the circumstances, Boart could reasonably have expected to pay a significant amount in costs if it had been unsuccessful on the motion.

**19** However, I cannot ignore the fact that despite the intense preparation and high stakes, this was still only a one day motion. This must inform my costs decision.

**20** In the *Jazz* case referred to above, Jazz Air had brought an unsuccessful one day interlocutory injunction motion against several defendants to restrain termination of its Toronto Island lease. It alleged, among other things, conspiracy and bad faith. One of the defendants was Porter Airlines who had made a huge capital investment and was planning to commence its operations at the Toronto Island. The injunction was brought on short notice, days before Porter was supposed to start renovations, and was heard 4 days after the notice of motion was served.

**21** Spence J. found the motion to be without merit and brought for tactical purposes. He awarded costs on a substantial indemnity basis in favour of the Porter defendants. They had sought fees of $176,321.25. He awarded fees of $160,000, plus GST and disbursements.

**22** The costs award was appealed to the Divisional Court and upheld by the majority on appeal. Pardu J., in considering quantum of costs, stated that although the costs were enormous, Spence J. had not erred in principle. She acknowledged the tight time frame for the injunction and found that the defendants "had to go flat out with all available resources".

**23** I find the *Jazz* case, while distinguishable on its facts, a good reference point for determining quantum in this case. Here the defendants also had to go flat out to defend their case in a relatively short period of time. The consequences of losing the injunction for the defendants were severe. The actions of Boart raised the costs of the defendants conducting their defence. Boart also did not produce its own dockets for comparison purposes.

**24** However, if $160,000 in fees on a substantial indemnity scale was awarded to the Porter defendants for that one day motion, I have difficulty awarding almost $300,000 in fees on a partial indemnity basis in this case. I recognize that this represents the costs of all defendants, not just one set; that preparation for the injunction spanned one month, not 4 days; that extensive cross-examinations were conducted; and that there was travel time and expense involved for some of the defendants.

**25** Still, I must look at the overall costs to be paid for a one day hearing. Even though the court in *Jazz* was prepared to award enormous costs to one defendant, it does not follow that large awards should be made to each of the defendants in this case. There is a cumulative effect. The aggregate cost award must still be justifiable.

**26** In its submissions, Boart took the position that the Bills of Costs submitted by the defendants were deficient in that they did not disclose the hourly rates of the individual lawyers or include dockets. Boart said that the court would not therefore be able to fix costs. This information was provided in the defendants' reply submissions.

**27** Boart also pointed out that the defendants were charging the maximum partial indemnity rates for lawyers whose year of call was closer to the next lower category. I agree that the rates for certain of the associates can be reduced slightly on that basis.

**28** I also note that the partial indemnity rates charged by counsel for JNP/Guido and Perrin/Cappadocia are a much higher percentage of their actual rates than those charged by the other defendants. This warrants a greater reduction of the costs claimed by them relative to those of the other defendants.

**29** However, I do not intend to engage in the exercise of hours multiplied by rates. For the most part, I accept that the hours were spent and that the rates are in keeping with those established by the Rules.

**30** Rather, I am guided by the oft-quoted passage on costs of the Ontario Court of Appeal, "the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant." (*Boucher et al. v. Public Accountants Council for the Province of Ontario et al.* (2004) 71 O.R. (3d) 291 at paragraph 26 (C.A.)).

**31** I am also mindful that while litigants must be prepared to pay the cost of engaging in litigation, cost awards must not be permitted to escalate to a level which will ultimately penalize those seeking recourse to the court system. Cost awards must be kept in check. Reasonableness and proportionality must continue to be the overriding principles.

**32** None of the cases cited by the defendants, with the exception of the *Jazz* case, approaches the magnitude of costs they are seeking on a collective basis, nor even on an individual basis for the costs claimed by JNP/Guido and Sandvik.

**33** Balancing all of the above factors, I am awarding costs to the defendants, inclusive of GST and disbursements, as set out below:

| | |
|---|---|
| JNP and Guido | $ 80,000 |
| Sandvik defendants | $ 75,000 |
| Boesche | $ 6,000 |
| Perrin and Cappadocia | $ 24,000 |
| TOTAL | $185,000 |

**34** In the above cost allocation, I have recognized that counsel for the Sandvik defendants had more significant disbursements than the other defendants since they had to travel to London, England for cross-examinations.

**35** I have also taken into account that there may have been some duplication in the issues considered by the various defendants. Finally, I have considered the relative complexity of the issues facing each of the defendants, those for the corporate defendants being more complex than those for the individuals.

**Decision**

**36** Boart is ordered to pay costs on a partial indemnity basis in the aggregate amount of $185,000, inclusive of GST and disbursements, to the defendants in the amounts set forth in paragraph 33. These costs are payable within 30 days.

B.A. CONWAY J.

cp/e/qlkxl/qlpwb/qlcas

# TAB 3

*Case Name:*

# Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.

**Between**
**Quizno's Canada Restaurant Corporation and Quizno's Canada Real Estate Corporation, Plaintiffs, and 1450987 Ontario Corp., 2036249 Ontario Inc., 2036250 Ontario Inc., Thomas Johnson and Douglas Johnson, Defendants**

[2009] O.J. No. 2563

2009 CarswellOnt 3512

Court File No. CV-09-7997-00CL

Ontario Superior Court of Justice

**P.M. Perell J.**

June 18, 2009.

(13 paras.)

*Civil litigation -- Civil procedure -- Costs -- Determination of costs -- Quizno's motion for an interim interlocutory injunction was granted and the judge's tentative view was that costs should be in the cause -- However, Quizno's sought costs on several bases, including on a full indemnity basis in the amount of $342,446 and on a partial indemnity basis in the amount of $194,902 -- However, the action was not over and it remained to be determined if Quizno's would succeed at trial -- Therefore, costs were ordered in the cause.*

**Statutes, Regulations and Rules Cited:**

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

Rules of Civil Procedure, Rule 57.03(1)(a)

**Counsel:**

Geoffrey B. Shaw, Eunice Machado, and Timothy Pinos, for the Plaintiffs.

David Sterns and Sam Hall, for the Defendants.

## COSTS ENDORSEMENT

**1** **P.M. PERELL J.**:-- In my Reasons for Decision dated April 28, 2009, I granted the Plaintiffs' motion for an interim interlocutory injunction. The motion had the effect of restraining the Defendants from operating as Quizno's franchisees until the trial of the action and having any interest in a competing submarine sandwich restaurant located within the area restricted by the franchise agreements. I dismissed a late arriving counter-motion from the Defendants.

**2** In paragraphs 112 and 113, I addressed the matter of costs, as follows:

> Finally, there is the matter of costs. Subject to receiving submissions from the parties, my view at present is that the costs of both the motions and the counter-motion should be in the cause, so that the costs of the motions correspond with the parties' success or failure after a trial where the merits of their competing claims will actually be determined.
>
> If costs are sought, then the parties' submissions should be in writing beginning with the franchisor within 20 days of the release of these Reasons for Decision followed by the franchisees submissions within a further 20 days.

**3** As appears, subject to hearing from the parties, I indicated that my tentative view was that costs should be in the cause. It was my view then and after receiving costs submissions from the parties, it remains my view that this would be the fairest and most just way to exercise the court's discretion with respect to costs.

**4** The Plaintiffs, however, did not agree with my tentative view and requested costs on four alternative bases: (1) on a full indemnity basis in the amount of $342,446.14 payable within 30 days; (2) on a partial indemnity basis in the amount of $194,902.24 payable within 30 days; (3) on the basis that the costs in the amount of $194,902.24 be payable to the Plaintiffs in any event of the cause; and (4) on the basis that the costs in the amount of $194,902.24 be payable to the Plaintiffs in the cause.

**5** In support of their claim for costs, the Plaintiffs referred to rule 57.03(1)(a), which provides that costs of a motion shall be fixed and payable within 30 days on the hearing of a contested motion, unless the court is satisfied that a different order would be more just.

**6** It may be noted that rule 57.03(1)(a) does not make mandatory the fixing of costs and the direction that they be payable within 30 days; the rule admits of the exception of where the court is satisfied that a different order would be more just. The court's residual discretion about costs remains: *Intercontinental Forest Products SA v. Rugo* [2004] O.J. No. 4190 (Div. Ct.).

**7** In the Plaintiffs' written submissions, they provide reasons why they should be entitled to costs on the several bases they advance, but they do not specifically address why my tentative view, which favoured a different order; namely, costs in the cause, would be an incorrect or improper exercise of the discretion provided by s. 131 of the *Courts of Justice Act*.

**8** Not surprisingly, the Defendants supported the order of costs in the cause, and they relied on the views expressed by Justice Robert J. Sharpe, in his text *Injunctions and Specific Performance*, at p. 2-91, which views have been cited with approval in *Tillsonburg Foamtec Inc. v. Free*, [2005] O.J.

No. 2255 (S.C.J.); *Penn-Co Construction Canada (2003) v. Constance Lake First Nation*, [2008] O.J. No. 3733 (S.C.J.); *Erinwood Ford Sales Ltd. v. Ford Motor Co. of Canada*, [2005] O.J. No. 2791 (S.C.J.). See also *Rogers Cable TV Ltd. v. 373041 Ontario Ltd*. [1994] O.J. No. 844 (Gen. Div.).

**9** In his text, Justice Sharpe stated:

> Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith. It has been held that where the motion was groundless and based upon unfounded allegations of fraud, deceit and conspiracy, it may be appropriate for the court to fix the costs on a solicitor and client scale and require that they be paid 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 question of costs to the trial judge.

**10** Where a plaintiff succeeds in obtaining an interlocutory injunction it is the preferable (although not inevitable) course to reserve costs to the trial judge, which is to say to make costs in the cause. This is the preferable course because it allows the court to have the benefit of hindsight and to avoid the possible injustice of awarding costs to a plaintiff for having succeeded in obtaining an order to protect his or her position pending trial when the outcome of the trial reveals that that plaintiff's position was not worthy of having been protected.

**11** It is for similar reasons that a plaintiff who succeeds in obtaining an interlocutory injunction must give an undertaking as to damages.

**12** The action at bar is not over, and it remains to be determined whether the Plaintiffs will succeed at trial.

**13** Accordingly, I am exercising my discretion to order costs in the cause.

P.M. PERELL J.

cp/e/qllxr/qlpxm/qlaxw

# TAB 4

# *Injunctions and Specific Performance*

**LOOSELEAF EDITION**

The Honourable
**Mr. Justice Robert J. Sharpe**
Court of Appeal for Ontario

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endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.[614a]

### 7. Costs of Interlocutory Injunction Motions

2.1330 Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith.[615] It has been held that where the motion was groundless and based upon unfounded allegations of fraud, deceit and conspiracy, it may be appropriate for the court to fix the costs on a substantial indemnity scale and require that they be paid forthwith.[616] 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 question of costs to the trial judge.[617] However, there is no rigid rule and where the interlocutory injunction effectively

614a *Novartis v. Hospira*, [2014] 1 W.L.R. 1264 at para. 41, [2013] EWCA Civ. 583.

615 *Accpac International, Inc. v. Softrak Systems, Inc.* (2000), 186 F.T.R. 279, 8 C.P.R. (4th) 189 (T.D.). Compare *Benoit v. Baie Verte, Central, Connaigre School Board— District 5* (1999), 182 Nfld. & P.E.I.R. 183 (Nfld. S.C.) at p. 200, the court refused to make a costs order against parents who unsuccessfully sought an injunction to restrain the consolidation of schools: "... it is important for those who feel aggrieved by decisions of governmental institutions to have reasonable access to the courts to challenge those decisions. To award costs against the St. Alban's parents would have an unwarranted chilling effect on such challenges. Citizens should feel that as a practical matter they can have their day in court." See also *Fibron Machine Corp. v. Sawley* (1999), 86 C.P.R. (3d) 448 at p. 465, 43 C.P.C. (4th) 35 (B.C.S.C.), and *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568, 11 C.P.R. (4th) 255 (C.A.), determination of costs of unsuccessful interlocutory injunction motion adjourned until after trial;*North Dumfries (Township) v. Geil* (2010), 195 A.C.W.S. (3d) 48, 2010 ONSC 5804 (S.C.J.), citing this paragraph at para. 5; *Cana International Distributing Inc. v. Standard Innovation Corp.* (2011), 198 A.C.W.S. (3d) 27, 2011 ONSC 752 (S.C.J.), citing this passage at para. 2 and holding that absent extraordinary circumstances, costs on an unsuccessful interlocutory injunction are payable forthwith; *Mealla v. Salba Corp. N.A.* (2010), 195 A.C.W.S. (3d) 638, 2010 ONSC 5212 (S.C.J.), citing this paragraph at para. 12 but fixing costs for the plaintiff following a successful motion.

616 *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126, 32 C.P.R. (3d) 559 (Gen. Div.), supp. reasons 4 O.R. (3d) 321, 37 C.P.R. (3d) 335.

617 *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.*, [1994] O.J. No. 1087; *Ontario (Attorney General) v. Ballard Estate*, [1995] O.J. No. 3885; *Johannesen (Re)* (2002), 218 D.L.R. (4th) 148, [2002] 11 W.W.R. 516 (Q.B.); *Nova Scotia Real Estate Commission v. Lorway MacEachern* (2006), 246 N.S.R. (2d) 369, 150 A.C.W.S. (3d) 788 (S.C.); compare *Omega Digital Data Inc. v. Airos Technology Inc.* (1997), 33 O.R. (3d) 23 (requiring a shell defendant financed by an off-shore company to pay money into court to secure the costs of the interlocutory injunction motion). See *Intercontinental Forest Products SA v. Rugoa* (2004), 69 O.R. (3d) 668, 181 O.A.C. 144 (S.C.J. (Div. Ct.)), granting leave to appeal to test the application of Ontatio rule 57.03(1), requiring immediate payment of costs to this situation.

ends the litigation, an immediate costs order may follow.[617a] In *Rogers v. Sudbury (Administrator of Ontario Works)*[618] costs were awarded to the plaintiff in a Charter case to encourage Charter claims and to encourage lawyers to take on such cases *pro bono*.

617a *Verge Insurance Brokers Ltd. v. Sherk* (2013), 237 A.C.W.S. (3d) 326, 2013 ONSC 7855 (Ont. S.C.J.); *Hudson Bay Mining & Smelting Co. v. Dumas* (2014), 370 D.L.R. (4th) 237 at para. 35, [2014] 4 W.W.R. 245 (Man. C.A.).

618 (2001), 57 O.R. (3d) 467 (Ont. S.C.J.).

# SCHEDULE B

## SCHEDULE B
## RELEVANT STATUTES

### *Courts of Justice Act*, R.S.O. 1990, c. C.43

**Costs**

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

### *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

**Discretion of Court**

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. R.R.O. 1990, Reg. 194, r. 49.13.

**Factors in Discretion**

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

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

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

**Contested Motion**

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

| | | | |
|---|---|---|---|
| THE CATALYST CAPITAL GROUP INC.<br>Plaintiff/Moving party | and | MOYSE ET AL<br>Defendants/Responding Party | Court File No. CV-14-507120 |

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto.

**REPLY COSTS SUBMISSIONS OF THE RESPONDING PARTY WEST FACE CAPITAL INC.**


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