Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

PLAINTIFF'S COSTS SUBMISSIONS
(MOTION HEARD JULY 2, 2015)

August 4, 2015

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A. Overview

1. These are Catalyst's responding cost submissions for the motions heard July 2, 2015. For both defendants, the costs claimed are far beyond what would be considered reasonable for a one-day motion and include costs relating to issues that will ultimately be determined at trial.

2. Catalyst acknowledges that costs follow the cause in the ordinary course. But this is not the usual case – the parties already argued an injunction motion for which costs were awarded in the cause. Most of the matters at issue in the motions heard on July 2 will ultimately be determined at trial. In these circumstances, Catalyst submits that a portion of the defendants' costs may be fixed now, but should only be made payable in the cause in order to avoid an unjust payment of costs prior to the final determination of the issues in dispute at trial.

3. In addition or in the alternative, in fixing costs, the defendants cannot seek indemnification for **all** of their time and disbursements.

4. Costs awards must reflect what the Court views as the "fair and reasonable" amount that should be paid by the unsuccessful party, not the actual costs incurred by the successful litigant.[1] In deciding what is fair and reasonable, the expectation of the parties is a relevant factor.[2] The comparison of fees incurred by the unsuccessful party to the costs claimed by the successful party is persuasive in determining the reasonable expectations of the losing party.[3]

5. In addition, the Court should consider that for the previous one-day injunction argued by these same parties, with a similar level of complexity and volume of motion materials, costs were fixed by

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[1] *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 at ¶26 (ON CA) (**Tab A**).
[2] *Ibid.*, at ¶38.
[3] *Canadian National Railway Corporation v. Royal and Sunalliance Insurance Co. of Canada*, 2005 CanLII 33041 at ¶10 (ON SC) (**Tab B**).

the Court at $75,000 and made payable n the cause. In that motion, the defendants' former counsel's partial indemnity costs were a fraction of the costs claimed by the defendants' new counsel.

6. Catalyst's costs outline delivered for this motion (prior to the decision) amounts to **one-third** of the costs incurred by both defendants, which is indicative of two factors to consider in fixing costs:

(a) The change of counsel for both defendants immediately following the commencement of this motion led to costs for new counsel to "get up to speed" on a complex file – costs that should not be indemnified by Catalyst; and

(b) The defendants are seeking costs for steps that relate to matters still at issue between the parties, for which costs are better left to be fixed and awarded by the trial judge.[4]

B. Costs Should be Made Payable in any Event in the Cause

7. The motions heard on July 2 were brought in the context of an ongoing action in which the ultimate issues have yet to be determined. The issues to be determined at trial include whether West Face misused Catalyst's confidential information and if so, the appropriate remedy for West Face's misconduct. With respect to Moyse, the issues to be determined include 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. Most, if not all, of the evidence produced by the parties in the course of the motions heard on July 2 is relevant to these issues and will form part of the trial record. If Catalyst were successful at trial, then the costs of adducing this evidence would, in the ordinary course, be payable to Catalyst. It would therefore be inequitable to award these costs payable within 30 days to the defendants, before the trial to determine the ultimate issues has taken place.

9. Catalyst acknowledges that a portion of the costs incurred, namely to prepare for and argue the motions, are less relevant to the trial. It therefore submits that a portion of the costs may be fixed and

[4] Catalyst's costs outline is attached at **Tab C.**

made payable to the defendants, but only in any event in the cause, to reflect the fact that these costs may be offset by costs payable to Catalyst on account of the conduct that was the subject of dispute in the motions and which will form the main issues in dispute in the action. In particular, the Court should bear in mind that Catalyst has already proven a strong *prima facie* case that Moyse communicated Catalyst's confidential information to West Face.[5]

C. West Face's Costs Are Excessive and Unreasonable

10. West Face's partial indemnity fees of $290,338.30 for one-half of a full day motion are excessive and unreasonable by any measure, but especially when compared to Catalyst's combined partial indemnity fees of $99,234.34 for **the full day**.

11. In its costs outline, West Face seeks indemnity for six timekeepers. The time claimed includes 118 hours by Anthony Alexander, a litigation partner called in 1994 whose name appears on none of the motion materials, 21 hours for Kevin Greenspoon, a solicitor, and 63 hours by a law student. Catalyst submits that none of this time should be included in the fixing of West Face's costs, as it is the product of unnecessary overlawyering and there is no evidence in the record to demonstrate that these lawyers made necessary contributions to the preparation for and argument of the motion.

12. Even for the two timekeepers whose names appear on the materials and who attended the hearings and examinations, the time claimed is grossly excessive. Mr. Milne-Smith claims 281 hours, or more than four times the hours claimed by Mr. DiPucchio for the entire motion (58), and Mr. Carlson claims 325 hours, or approximately 1.8 times the 176 hours claimed by Mr. Winton for the entire motion.

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[5] See, *e.g.*, *1483860 Ontario Inc. (Plan IT Search) v Beaudoin*, 2015 ONSC 2662, in which Justice Perell ordered costs in any event in the cause for a motion to set aside an Anton Piller Order and to resist the scheduling of a contempt motion **(Tab D)**.

13. In addition, the near 1:1 ratio of time by Mr. Milne-Smith to Mr. Carlson suggests either there was significant overlap of time claimed or that work performed by senior counsel could have been delegated to a more junior lawyer. In either case, Catalyst cannot be reasonably required to indemnify West Face for its staffing decisions, especially when compared to the more reasonable 1:3 ratio of time between Catalyst's senior counsel and junior counsel.

14. These excessive amounts of time are unreasonable and can be directly traced to the fact that Davies was retained by West Face to respond to Catalyst's motion several weeks after the motion was commenced, which created the need for new counsel to get up to speed on a complex file that already had a voluminous record in a very short period of time.[6] West Face is entitled to change counsel mid-motion, but it is not reasonable for it to expect Catalyst to indemnify it for the cost of doing so.

15. West Face's disbursements include over $27,000 for its IT expert, whose evidence is relevant to matters at issue in the trial. Responsibility for that disbursement is best left to be determined by the trial judge.

16. In addition, West Face claims $7,354.35 in costs for photocopying. This is almost twice the costs incurred by both Moyse and Catalyst **combined**.

17. Having regard to the fact that the West Face motion was argued in less than full day, that most of the evidence will be relevant to matters at issue in the trial and with reference to the time incurred by Catalyst, Catalyst submits that no more than $30,000 of West Face's costs should be fixed in relation to this motion, to be payable in any event in the cause.

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[6] See email from M. Milne-Smith to R. Di Pucchio dated March 3, 2015, attached at **Tab E**.

D. Response to Moyse's Costs Submissions

18. Moyse also changed counsel after this motion was commenced.[7] Moyse's new counsel claim fees for three lawyers, including a junior associate who claims 114 hours even though she did not appear on any of the motion materials and did not examine or represent any witnesses. Again, the time claimed bears the hallmark of overlawyering that should not be indemnified by Catalyst.

19. Moreover, the time claimed by Moyse's is disproportionate to the time spent to argue the contempt motion (less than half a day), in circumstances where the facts at issue where not very complex. Again, as with West Face, the excessive time claim as compared to Catalyst's time spent on the entire motion is reflective of the need for new counsel to learn a new file in a very short period of time, for which Catalyst should not be held responsible.

20. Finally, regard must be had to the circumstances that led to the bringing of this contempt motion: Moyse, allegedly without consulting with his counsel, chose to delete data from his personal computer the night before it was to be forensically imaged pursuant to a Court order that included a preservation order. Whether or not Moyse acted in contempt, he acted recklessly in the face of the Court Order and bears some responsibility for the contempt proceeding being brought against him.

21. Having regard to the time spent arguing the motion and the relatively more straightforward issues in the contempt motion, and the fact that Moyse's reckless conduct led to the bringing of this motion, Catalyst submits that no more than $20,000 of Moyse's costs should ordered payable in any event in the cause.

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[7] Moyse's Notice of Change of Lawyers dated **February** 18, 2015 is attached at **Tab F**.

E. Costs for the Previous Full-Day Hearing were Fixed at $75,000 in the Cause

22. This is not the first factually complex full-day motion argued by these parties. In the previous injunction motion, with similarly complex legal issues and a similar-sized evidentiary record, the defendants' costs (approximately $78,000 for West Face and $61,000 for Moyse) were a fraction of the costs sought by the defendants in this motion.[8] Again, this supports the conclusion that most of the costs incurred by new counsel were in relation to the transition from old counsel and not properly the subject matter of a costs award.

23. In its costs submissions for the previous injunction motion, which it lost, West Face argued that the appropriate range for fees to be awarded to Catalyst was $50,000, to reflect the principle of proportionality recognized by this Court in *Mason v. Chem-Trend Ltd. Partnership*.[9]

24. The previous motion was very similar to the current motion – Catalyst sought injunctive relief and an order for an ISS to review forensic images of electronic devices. The motion involved multiple rounds of affidavits, numerous days of examinations, and several attendances at Court prior to a full day of argument. In that motion, Justice Lederer ordered costs, in the cause, of $75,000 on a partial indemnity basis.[10]

25. Catalyst submits that the costs fixed by Justice Lederer are a useful comparison point for costs of the present motion and provide a good measuring stick for the reasonable expectations of the parties. It would be manifestly unfair to Catalyst if the costs fixed in relation to this one-day motion were four times the amount fixed by Justice Lederer for a similar motion.

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[8] The defendants' costs outlines for the previous motion are attached at **Tab G.**

[9] The relevant excerpt from West Face's previous counsel's costs submissions is attached at **Tab H.** *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONSC 839, is attached at **Tab I.** In *Mason*, costs for a full-day injunction motion were fixed at $17,000. The successful party had sought costs of $175,000.

[10] The costs endorsement of Justice Lederer is attached at **Tab J.**

26. However, unlike in the previous motion, for which the injunction order is now expired and therefore moot, in the current motion most of the matters in dispute will only be resolved at trial. For this reason, it would not be equitable to make an award of costs to adduce evidence that will form part of the evidentiary record at trial.

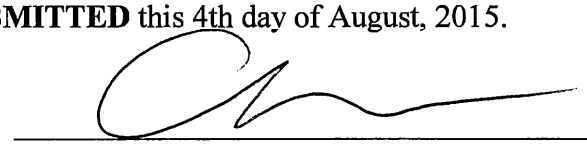
F. Conclusion

27. These motions were heard over the span on one day. In *1483860 Ontario*, a case where a motion to set aside an Anton Piller Order and to resist scheduling a contempt motion was heard over the course of **two day**s, Justice Perell ordered costs of $100,000 to the successful defendants, in any event in the cause. In so doing, Justice Perell stated:

> I arrive at the $100,000 figure by reviewing the various items of the Defendants' **B**ill of Costs. Having done so, I think there is merit in the Plaintiffs' various submissions to the end that the costs being claimed are excessive and unreasonable. From my role case managing class actions, I have some experience with complex and expensive interlocutory motions, and I cannot see any justification for expending almost a half a million dollars for an interlocutory motion for what, at the end of the day, is an employer-employee dispute.[11]

28. If similar reasoning is applied to the current case, then an award of $50,000, all-inclusive, for both defendants' costs, payable in any event in the cause, is fair and reasonable in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2015.



Rocco DiPucchio/Andrew Winton

Lax O'Sullivan Scott Lisus LLP
Lawyers for the Plaintiff

[11] *1483860 Ontario Inc.*, *supra*, at ¶74.

TAB A

See pages 12-13 and 17

Boucher et al. v. Public Accountants Council for the Province of Ontario et al.

[Indexed as: Boucher v. Public Accountants Council for the Province of Ontario]

71 O.R. (3d) 291
[2004] O.J. No. 2634
2004 CanLII 14579
Docket No. C40044

Court of Appeal for Ontario,
Abella, Cronk and Armstrong JJ.A.
June 22, 2004

Civil procedure -- Costs -- Costs grid -- Partial indemnity costs -- Fixing costs of abandoned application -- Factors in assessing costs -- Court to consider result produced and whether result is fair and reasonable -- Overall objective of fixing costs is to fix amount that is fair and reasonable for unsuccessful party to pay in particular circumstances, rather than amount fixed by actual costs incurred by successful litigant -- Error in principle to grant award of costs on partial indemnity basis that is virtually same as award on substantial indemnity basis -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01(1), (3), (3.1).

In earlier proceedings, the appellants, who were Certified General Accountants, and two other parties sought to have the court appoint disinterested persons to hear their applications for public accounting licences. Central to these proceedings was the allegation that the Public Accountants Council for the Province of Ontario ("PA Council") was controlled by the Institute of Chartered Accountants of Ontario ("CA Institute"), which was authorized by the Public Accountancy Act, R.S.O. 1990, P.37, to appoint 12 of the 15 members of the PA Council.

Lax J. stayed the earlier proceedings on the basis that the court lacked jurisdiction to make the order requested. Lax J. fixed costs against the appellant in the amount of $97,563.

The appellants commenced the immediate application and alleged reasonable apprehension of bias against the PA Council in its review of applications for licences to practise public accounting by members of the Certified General Accounting Association of Ontario. By court order, the material for the application before Lax J. was used in the new application.

The respondents moved to have the application quashed; however, before the application was heard, it was abandoned. The respondents moved for costs pursuant to rule 37.09(3) on a substantial indemnity basis. Epstein J. fixed the costs on a partial indemnity basis, including disbursements and GST as follows: PA Council, $88,896.45; individual respondents, $60,033.96; and CA Institute, $38,752.10 for a total of $187,682.51. (This sum was only $14,528.86 less than the amount claimed on a substantial indemnity basis.)

The appellants appealed and raised the grounds that (1) costs should have been referred for assessment and not fixed; and (2) the costs, which were calculated in accordance with the costs grid, were excessive.

Held, the appeal should be allowed.

Epstein J. did not err in fixing costs rather than having costs referred to an assessment officer. There is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. If a judge is able to effect procedural and substantive justice in fixing costs, he or she ought to do so. There was no basis upon which to interfere with the motion judge's discretion not to refer the costs for assessment. [page292]

However, the costs award calculated in accordance with the costs grid was excessive. While it was appropriate to do the costs grid calculation, it was also necessary to consider the result produced and determine whether in all the circumstances

the result is fair and reasonable. Subrule 57.01(3) lists a broad range of factors that the court may consider in exercising its discretion to award costs, and the fixing of costs is not simply a mechanical exercise. The fixing of costs does not begin or end with the calculation of hours times rates. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by the actual costs incurred by the successful litigant.

Awarding $187,682.51 was not fair and reasonable in the circumstances of this case; the costs were so excessive as to call for appellate interference. In deciding what is fair and reasonable, the expectation of the parties concerning the quantum of a costs award is a relevant factor. Consideration should be given to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the PA Council by the CA Institute. The fact that all parties were satisfied to have the same evidentiary record in both cases suggested that there was much in common between the two applications. Further, the respondents filed no evidence, conducted no cross-examination and advanced substantially the same arguments in support of the motions to quash. Finally, there was no proportionality between the costs claimed on a substantial indemnity scale and the costs awarded on a partial indemnity scale. The granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. These factors suggested that the amounts awarded on a partial indemnity basis should be significantly reduced. A fair and reasonable award, taking into consideration all the factors discussed above, was as follows: PA Council, $30,000; individual respondents, $20,000; CA Institute, $13,000, for a total of $63,000, inclusive of disbursements and Goods and Services Tax.

Cases referred to

Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.); Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 85 F.T.R. 79n, 177 N.R. 325, [1995] S.C.J. No. 1; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2004] S.C.J. No. 72, 235 D.L.R. (4th) 193, 316 N.R. 265, 2004 SCC 9, 40 B.L.R. (3d) 1; Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, [2002] O.T.C. 78, 17 C.P.C. (5th) 334 (S.C.J.); Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21, 41 B.L.R. (2d) 10, 22 C.P.C. (4th) 235, 5 C.B.R. (4th) 57 (C.A.); Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 71 O.R. (3d) 263, 187 O.A.C. 78, [2004] O.J. No. 2102 (C.A.); Toronto (City) v. First Ontario Realty Corp. (2002), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.); Wasserman, Arsenault Ltd. v. Sone, [2002] O.J. No. 3772, 164 O.A.C. 195, 38 C.B.R. (4th) 119 (C.A.); Zesta Engineering Ltd. v. Cloutier (2002), 2003 C.L.L.C. 210-010, 21 C.C.E.L. (3d) 164, [2002] O.J. No. 3738 (C.A.), supp. reasons (2002), 21 C.C.E.L. (3d) 161, [2002] O.J. No. 4495 (C.A.), revg [2001] O.J. No. 621, 2001 C.L.L.C. 210-024, 7 C.C.E.L. (3d) 53 (S.C.J.) [page293]

Statutes referred to

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

Public Accountancy Act, R.S.O. 1990, c. P.37

Public Officers Act, R.S.O. 1990, c. P.45

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01, 58

APPEAL from an order of Epstein J. dated November 29, 2002, allowing costs for an abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg.

David E. Wires, for appellants.

Michael D. Lipton, Q.C., for the Public Accountants Council for the Province of Ontario.

Cynthia Amsterdam, for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer and Thomas A. Hards.

Robert D. Peck, for The Institute of Chartered Accountants of Ontario.

The judgment of the court was delivered by

[1] ARMSTRONG J.A.: -- This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

[2] The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

[3] Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services

Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003. [page294]

Background of the Proceedings

[4] The judicial review application had its genesis in the prior proceeding of Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the Public Officers Act, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the Public Officers Act to make the order requested.

[5] In granting the stay, Lax J. said [at paras. 17 and 37] in obiter dicta:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process. . . .
>
> . . . . .
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the Public Officers Act, there may be other creative ways for the applicants to have their concerns addressed.

[6] Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

[7] The appellants then commenced their judicial review application, naming as parties the same respondents with the

addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the Public Accountancy Act, R.S.O. 1990, c. P.37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

[8] At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

[9] The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' [page295] applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

[10] The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

[11] The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

[12] The motions judge fixed the costs of the application for

judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	$ 88,896.45
Individual Respondents	$ 60,033.96
Institute of Chartered Accountants of Ontario	$ 38,752.10
Total	$187,682.51

Grounds of Appeal

[13] The appellants raise the following grounds of appeal:

(i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and

(ii) the costs awarded are excessive in that they are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

[14] The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which provides: [page296]

> 37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1),

which states:

> 57.01(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

[15] The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said [at para. 52]:

> Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: BNY Financial Corp.-Canada v. National Automotive Warehousing Inc., [1999] O.J. No. 1273 (Commercial List, Gen. Div.) (BNY Financial).

[16] I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See Murano v. Bank of Montreal (1998), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21 (C.A.) at p. 245 O.R., per Morden A.C.J.O.

[17] The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument.

While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

[18] I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge may refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, [page297] including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

[19] The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer C.J.C. in Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, at p. 32 S.C.R.:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

[20] In a more recent case, Arbour J. said in Hamilton v. Open Window Bakery Ltd., [2004] S.C.J. No. 72, 2004 SCC 9, at para. 27:

> A court should set aside a costs award on appeal only if

the trial judge has made an error in principle or if the costs award is plainly wrong (Duong v. NN Life Insurance Co. of Canada (2001), 141 O.A.C. 307, at para. 14).

[21] The appellants point out that the costs awarded in these proceedings are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

[22] Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were [page298] assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

[23] The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the Public Accountancy Act; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The

respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002, when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded [at para. 67] that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

[24] The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in Zesta Engineering Ltd. v. Cloutier, [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (C.A.) at para. 4 where it said:

> In our view, 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.

See also Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 71 O.R. (3d) 263, [2004] O.J. No. 2102 (C.A.) at para. 97.

[25] Zesta Engineering and Stellarbridge simply confirmed a well settled approach to the fixing of costs prior to the establishment of [page299] the costs grid as articulated by Morden A.C.J.O. in Murano v. Bank of Montreal at p. 249 O.R.:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprise the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts.

An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

[26] It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> 57.01(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, 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.

[27] In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said [at paras. 69-70]:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to

the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.

While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. [page300] In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings.

I agree with what Nordheimer J. said in Basedo v. University Health Network, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

[28] With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

[29] While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

[30] In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis. [page301]

[31] The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

[32] The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -- $350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior

counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

[33] Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

[34] There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

[35] In Wasserman, Arsenault Ltd. v. Sone, [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.), at para. 4, this court referred to a judgment of the Superior Court in Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, 17 C.P.C. (5th) 334 (S.C.J.), where Nordheimer J. observed at para. 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

[36] In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in

principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in Stellarbridge at para. 96. [page302]

[37] The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

[38] In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See Toronto (City) v. First Ontario Realty Corp. (2002), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.) at p. 574 O.R. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

[39] Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

[40] No doubt there was much more work to be done in respect of the second application. However, having expended partial

indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting tabula rasa when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

[41] I also take into account the other factors referred to in para. 29 above, i.e., the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash. [page303]

[42] Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

[43] These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

[44] In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	$ 30,000.00
Individual Respondents	$ 20,000.00
Institute of Chartered Accountants of Ontario	$ 13,000.00
Total	$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

[45] In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in para. 44 above.

[46] I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

Order accordingly.

TAB B

See page 6

Canadian National Railway Corporation et al. v. Royal and Sunalliance Insurance Company of Canada et al.

[Indexed as: Canadian National Railway Corp. v. Royal and Sunalliance Insurance Co. of Canada]

77 O.R. (3d) 612
[2005] O.J. No. 3931
Court File No. 95-CU-91438

Ontario Superior Court of Justice,
Ground J.
September 14, 2005

Civil procedure -- Costs -- Fixing costs -- Plaintiffs submitting bill of costs claiming fees, GST and disbursements in amount of $1,644,496.83 -- Defendants submitting that they could not reasonably have expected plaintiffs to spend approximately four times more than defendants spent on litigation -- Costs reduced to $1,150,837.35.

The plaintiffs submitted a bill of costs claiming fees in the amount of $1,261,364 plus GST and disbursements for a total of $1,644,496.83. The defendants submitted that they could not reasonably have expected the plaintiffs to spend approximately four times more than the defendants spent on the litigation.

Held, the bill should be reduced.

The comparison of the fees charged to the defendants and the costs being claimed by the plaintiffs was persuasive in determining the reasonable expectations of the losing party. While the plaintiffs apparently took a "money is no object" approach to the preparation for trial, the question for the court was what amount would constitute fair and reasonable costs to be paid by the defendants to the plaintiffs. The fees

claimed by the plaintiffs should be substantially reduced. The plaintiffs were awarded $800,000 for fees, together with $56,000 for GST, and $294,837.35 for disbursements, for a total of $1,150,837.35.

Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56 (C.A.); Walker v. Ritchie, [2005] O.J. No. 1600, 197 O.A.C. 81, 31 C.C.L.T. (3d) 205, 25 C.C.L.I. (4th) 60, 12 C.P.C. (6th) 51 (C.A.), supp. reasons [2005] O.J. No. 2633, 25 C.C.L.I. (4th) 93 (C.A.), apld

Other cases referred to

Banihashem-Bakhtiari v. Axes Investments Inc. (2003), 66 O.R. (3d) 284, [2003] O.J. No. 3071, [2003] O.T.C. 702 (S.C.J.); Celanese Canada Inc. v. Canadian National Railway Co., [2005] O.J. No. 1122, 196 O.A.C. 60 (C.A.); Hague v. Liberty Mutual Insurance Co., [2005] O.J. No. 1660, [2005] O.T.C. 290, 21 C.C.L.I. (4th) 300, 13 C.P.C. (6th) 37 (S.C.J.)

RULING on costs.

Richard H. Shaban and Sharon Vogel, for plaintiffs.

David E. Liblong and Theresa Hartley, for defendants.

[1] Endorsement by GROUND J.:-- The lengthy trial of this matter was completed on March 22, 2004. Subsequently, counsel have made written and oral submissions with respect to the costs of the action, most recently at a case conference held on May 3, 2005. [page613]

[2] It was agreed that the trial in this action having been completed on March 22, 2004, the Costs Grid, as modified by the decision in Boucher v. Public Accountants Council for the

Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.) is applicable to the determination of costs in this action. It has also been agreed that the appropriate scale of costs is the partial indemnity scale to September 12, 2003, the date of the settlement offer made by the plaintiffs, and the substantial indemnity scale thereafter.

[3] As a result of the case conference, the following agreements have been made with respect to items in the original Bill of Costs submitted by the plaintiffs:

(a) where the hourly rate claimed in the Bill of Costs exceeds 75 per cent of the amount actually billed to the client for that work, the amount in the Bill of Costs will be reduced to 75 per cent of the amount actually billed to the client;

(b) with respect to the time charges of Ms. Moskovich, her charging rate will be reduced to $80 per hour for the period during which she was doing primarily law clerk work;

(c) with respect to the time charges of Ms. Zablocki, her total time charges will be reduced to $6,700;

(d) with respect to charges for work done prior to the issuance of the Statement of Claim, work related to the proof of loss will be deducted from the Bill of Costs, work with respect to document discovery will be included, and work with respect to research and experts' reports will be reduced by 50 per cent of the docketed amount;

(e) time charges for administrative people and for ungowned lawyers and clerks in court will be deleted from the Bill of Costs; and

(f) the disbursement for expedited transcripts of four days' of testimony will be included as a disbursement in the Bill of Costs.

[4] An issue has been raised by counsel as to whether the maximum counsel fee per day of trial as set out in the Costs Grid is applicable in situations where the nature of the action

justifies, and the party has in fact been represented by, more than one counsel at trial. In the case at bar, the plaintiffs were represented throughout the trial by two or three counsel from time to time. Reference was made to a number of apparently conflicting [page614] decisions on this question and in particular the decision of Borins J.A. in Celanese Canada Inc. v. Canadian National Railway Co., [2005] O.J. No. 1122, 196 O.A.C. 60 (C.A.), at paras. 45 to 51 where Borins J.A. analyzed the conflicting jurisdiction, adopted the analysis of Lane J. in Banihashem-Bakhtiari v. Axes Investments Inc. (2003), 66 O.R. (3d) 284, [2003] O.J. No. 3071 (S.C.J.) and concluded that a fee for second counsel is permissible under the Costs Grid but that the aggregate counsel fees per day cannot exceed the maximum amou nt permitted under the Costs Grid.

[5] In the recent decision of the Court of Appeal in Walker v. Ritchie, [2005] O.J. No. 1600, 12 C.P.C. (6th) 51 (C.A.), the court adopted the reasoning in Celanese Canada, supra. The court stated at paras. 102 and 103:

> Since the hearing of this appeal, this court released its decision in Celanese Canada Inc. v. Canadian National Railway Co., [2005] O.J. No. 1122 (C.A.). At paras 45-51, Borins J.A. writing for himself, analyses [sic] the conflicting jurisprudence and follows Lane J.'s analysis in Banihashem-Bakhtiari. He concludes that fees for a second counsel are permissible under the cost grid but that the aggregate counsel fees cannot exceed the maximum permitted under the costs grid. We adopt that view.
>
> Thus, the trial judge erred in principle in awarding counsel fees in excess of the maximum provided for in the grid and that part of the award that reflects counsel fees in excess of the maximum is set aside.

[6] Accordingly, although I have some reservations in this regard, I am compelled to follow the Court of Appeal decisions and hold that the maximum counsel fee applicable in the case at bar is a counsel fee of $2,300 per day on the partial indemnity scale and $4,000 per day on the substantial indemnity scale in accordance with the Costs Grid and the Bill of Costs will be

adjusted accordingly.

[7] The other issue raised by counsel for the defendants was their submission that, even with the above adjustments, the Bill of Costs submitted by the plaintiffs was excessive and should be reduced to take into account the reasonable expectation of the parties.

[8] The adjusted Bill of Costs submitted by the plaintiffs claims fees in the amount of $1,261,364 plus GST and disbursements for a total of $1,644,496.83. It is acknowledged by both parties that the action involved complex, technical and expert evidence with respect to engineering and numerous issues of insurance law and interpretation of insurance policy provisions in respect of some of which there was very little jurisprudence. A significant consideration in determining an appropriate quantum of costs in this matter is that through the co-operation of counsel resulting in an agreement as to quantum, an agreed statement of facts, a brief of [page615] documents and written interrogatories, the trial time was considerably shortened and the court's time used efficiently and economically. Accordingly, comparisons to other cases looking at the number of trial days and the costs awarded seem to me to be not particularly helpful. I have been referred by both parties to a number of authorities, all of which, in my view, can be distinguished from this case and I adopt the statement of Nordheimer J. in Hague v. Liberty Mutual Insurance Co., [2005] O.J. No. 1660, [2005] O.T.C. 290 (S.C.J.), at para. 9 as follows:

> Put shortly, comparisons to other cases are of very limited use. I appreciate that one should strive for some measure of consistency in terms of costs awards but the more complicated and fact specific any step in an action is, then the more reason there is for differentiation to occur between cases in terms of the amount of costs that are ultimately fixed.

[9] In a situation where comparisons to other cases do not appear to be particularly helpful, it [is] somewhat difficult to determine a standard by which the total costs claimed by the successful party should be measured. In Boucher, supra,

Armstrong J.A. stated at paras. 37 and 38 as follows:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.
>
> In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See Toronto (City) v. First Ontario Realty Corp. (2002), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.) at p. 574 O.R. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

[10] In the present case, although there is no evidence before the court, the defendants have stated in their submissions that "the defendants could not have reasonably expected the plaintiffs to spend approximately 4 times more than what they spent on the litigation". Although one would normally expect more time to be spent by the plaintiffs than by the defendants in pre-trial proceedings and preparation for trial, the comparison of the fees charged to the defendants and the cost being claimed by the plaintiffs is persuasive in determining the reasonable expectations of the losing party. [page616]

[11] It has been stated many times that the fixing of costs by a judge is not an assessment and it is not the role of the judge to minutely examine and dissect docket entries or to

second guess the utilization of personnel and resources by counsel. In reviewing the Bill of Costs submitted by the plaintiffs, I must, however, conclude that there appears to have been a "money is no object" approach taken by counsel toward the preparation for trial and that the maximum number of hours was expended by counsel in a very thorough, perhaps, in some cases, to a fault, preparation of documents and other materials for trial. This approach may have been perfectly acceptable to the plaintiffs in view of the amount of money involved in the action and the complexity and importance of the matter to the plaintiffs. The question, however, for the court is what amount would constitute fair and reasonable costs to be paid by the defendants to the plaintiffs.

[12] I must conclude that, taking into account all of the above factors, the fees claimed by the plaintiffs should be substantially reduced and I would award costs to the plaintiffs of $800,000 for fees together with $56,000 for GST and disbursements of $294,837.35 for a total of $1,150,837.35.

Order accordingly.

TAB C

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

COSTS OUTLINE ON THE PARTIAL INDEMNITY SCALE
(MOTION RET. JUNE 11 AND CONTINUED JULY 2, 2015)

The Plaintiff provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)	$	99,234.34
Estimated lawyer's fee for appearance	$	4,000.00
Disbursements	$	3,316.83
Total	$	106,551.17

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the complexity of the proceeding

This was a complex proceeding involving issues of contempt of court, combined with misuse of confidential information. There were many affiants and cross-examinations.

- the importance of the issues

The issues are important to all of the parties.

- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

- a party's denial of or refusal to admit anything that should have been admitted

- the experience of the party's lawyer

Rocco DiPucchio - 1996
Andrew Winton - 2007

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEM	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE
Attend to consider motion for injunctive relief and scheduling of motion; conduct searches and review materials; prepare motion record, supplementary motion record and second supplementary motion record; arrange for service and filing of same; receipt and review of opposing parties' responding motion record and supplementary responding motion record; receipt and review of defendants' joint supplementary responding motion record, joint brief	R. DiPucchio	30.0	$475	$795
	A. Winton	114.7	$330	$550
	Law Clerk	.30	$200	$335

FEE ITEM	PERSONS	HOURS	PARTIAL INDEMNITY RATE	ACTUAL RATE
of authorities and facta; prepare factum and arrange for service and filing of same; prepare oral submissions for attendance on motion; attend to argue motion on June 11, 2015 whereby motion was adjourned; attend to re-scheduling motion; prepare oral submissions for second attendance on July 2, 2015 attend to all necessary meetings, correspondence and telephone attendances.				
Attend to schedule cross-examinations; prepare for and attend cross-examinations of A. Griffin on May 8, 2015, B. Moyse on May 11, 2015, A. El Shanawany on May 12, 2015, J. Riley on May 13, 2015, K. Lo on May 14, 2015 and H. Burt-Gerrans on May 19, 2015; review transcripts of cross-examinations and attend to undertakings given and received.	R. DiPucchio A. Winton Law Clerk	28.4 59.9 4.7	$475 $330 $200	$795 $550 $335
Prepare costs outline for June 11, 2015 attendance; updated costs outline for further attendance on July 2, 2015.	Law Clerk	4.0	$200	$335

SUMMARY OF FEES:	58.4 hrs x $475	= $ 27,740.00
	176.6 hrs x $330	= $ 58,278.00
	9.0 hrs x $200	= $ 1,800.00
	Subtotal	= $ 87,818.00
	HST	= $ 11,416.34
	TOTAL	= $ **99,234.34**

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: July 2, 2015

Andrew Winton

APPENDIX

DISBURSEMENTS

Court filing fee	$127.00
*Process Server	$330.00
*Photocopies	$1,231.00
*Official Examiner	$1,247.75
*Courier	$14.11
Subtotal	$2,949.86
HST on items marked with *	$366.97
TOTAL	**$3,316.83**

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

COSTS OUTLINE ON THE PARTIAL INDEMNITY SCALE (MOTION RET. JUNE 11 AND JULY 2, 2015)

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Lawyers for the Plaintiff

TAB D

See page 9

CITATION: 1483860 Ontario Inc. (Plan IT Search) v. Beaudoin, 2015 ONSC 2662
COURT FILE NO.: CV-10-405615
DATE: 20150423

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
1483860 ONTARIO INC., o/a Plan IT Search and 6573908 CANADA INC., o/a Plan IT Search Inc. Plaintiffs	*Michael Gayed* for the Plaintiffs
– and –	
JAMES BEAUDOIN, 2103235 ONTARIO INC., WORLDHIRE INC., MASON STUBEL and PATRICIA BEAUDOIN Defendants	*John H. Yach* for the Defendants
	HEARD: In writing

PERELL, J.

REASONS FOR DECISION - COSTS

A. INTRODUCTION

[1] In this acrimonious litigation between an employer and former employees, the Defendants succeeded in having an Anton Piller Order set aside and in resisting a contempt proceeding being launched. See *1483860 Ontario Inc. (Plan IT Search) v. Beaudoin*, 2015 ONSC 641.

[2] The Defendants now seek - on a full indemnity basis - costs of $450,480.36, all inclusive, to be paid within 30 days. The Defendants also seek an order prohibiting the Plaintiffs from taking any further steps in the action until the costs award is paid. The Defendants justify their claim for full indemnity by alleging reprehensible conduct by the Plaintiffs' principal and main witness for the interlocutory motion. They also disparage the conduct of the Plaintiffs' lawyer.

[3] For their part, the unsuccessful Plaintiffs seek to set off the costs for a preliminary production motion and for a related abandoned appeal, but their primary submission about costs is that there should be no order as to costs.

[4] The Plaintiffs submit that the Defendants should recover no costs because they unreasonably refused an Offer to Settle that would have substantially resolved the dispute about the Anton Piller Order.

[5] In the alternative, the Plaintiffs submit that the scale of costs should be based on a partial indemnity and not a full indemnity basis. And, in any event, they submit that the amount claimed for costs by the Defendants is grossly excessive.

[6] The Plaintiffs submit that in all the circumstances, the appropriate quantum of costs, if any, to be paid the Defendants is $14,577.85 (that is, $55,000 for the Anton Piller motions less the Plaintiffs' costs of $40,422.15 on a partial indemnity basis from the date of the Offer to Settle.) The Plaintiffs then claim costs of $29,331.04 for a production motion that led to an appeal and an abandoned motion for leave to appeal. It seems on this alternative theory, the Plaintiffs are ultimately claiming $14,753.19 for themselves ($29,331.04-$14,577.85).

[7] I am not much persuaded by the submissions of either party, and for the reasons that follow, I make a hybrid costs award.

[8] For the Anton Piller motion, I award the Defendants costs on a partial indemnity basis of $100,000 payable in any event of the cause less $10,000 for the production motion payable on a partial indemnity basis to the Plaintiffs in the cause.

[9] In my opinion, there should be a punitive costs award in the circumstances of this case, but the appropriate award is not full indemnity payable forthwith. Rather, the appropriate order is costs to the Defendants in any event of the cause.

[10] There is more than enough mud to throw in this case, and the mud-slinging Defendants ultimately may not emerge from this litigation spotless. In the circumstances of this case, with the merits yet to be decided, the Defendants do not make out a case for full indemnity costs for the Anton Piller motion and an associated attempt to schedule a contempt hearing.

[11] In my opinion, the award to the Defendants should not be reduced or affected by the Plaintiffs' Offer to Settle, which was no more than a feeble effort to reduce the adverse costs from an ill-advised and ill-prosecuted Anton Piller motion and contempt proceeding.

[12] The partial indemnity award to the Defendants payable in any event of the cause should, however, be reduced by a partial indemnity award payable to the Plaintiffs for a production motion that the Defendants ultimately abandoned.

[13] Before explaining my award, I note that the written submissions that I considered were comprised of: (1) the Defendants' Costs Submissions dated February 17, 2015; (2) the Plaintiffs' Costs Submissions dated March 5, 2015; (3) the Defendants' Reply Costs Submissions dated April 14, 2015 (objected to for late delivery); and (4) the Plaintiffs' Reply to the Reply dated April 22, 2015 (objected to for unauthorized delivery). The parties' respective silly objections to the delivery of some of this material is indicative of their incivility and tedious failure to co-operate in the administration of justice in an adversary system with rules of civil procedure.

B. FACTUAL AND PROCEDURAL BACKGROUND

[14] As described in *1483860 Ontario Inc. (Plan IT Search) v. Beaudoin*, *supra*, in August 2009, the Defendants James Beaudoin and 2103235 Ontario Inc. ("Beaudoin's Corporation") resigned as consultants for the Plaintiffs, 1483860 Ontario Inc. and 6573908 Canada Inc.

(collectively "Plan IT"). A few months earlier, in March 2009, Mr. Beaudoin, along with the Defendant Mason Stubel, who had been a contractor for Plan IT in 2006 and 2007, incorporated the Defendant Worldhire Inc., to compete with the Plaintiffs.

[15] Between March and August 2009, Mr. Beaudoin continued to work for the Plaintiffs while he was setting up a rival business. Then he left to join the new business. After Mr. Beaudoin's departure, almost a year passed, during which Joseph Zitek, the principal of Plan IT, discovered Mr. Beaudoin's involvement with Worldhire Inc., and so, on June 24, 2010, the Plaintiffs commenced an action, and on July 16, 2010, on a motion without notice, Justice Ellen Macdonald granted the Plaintiffs an Anton Piller Order.

[16] In his supporting affidavit for the Anton Piller Order, Mr. Zitek relied on Mr. Beaudoin having acknowledged prior wrongdoing, and Mr. Zitek alleged breaches of a Consulting Services Agreement.

[17] Mr. Zitek, however, did not disclose the circumstances of the signing of an Acknowledgement Letter or the Consulting Services Agreement. He did not point out that the non-solicitation clause of the Consulting Services Agreement applied only to candidates under contract with Plan IT, of which there was only one person not the 12 alleged by him.

[18] In his supporting affidavit, Mr. Zitek deposed that he first learned about Worldhire Inc. placing candidates that had been on Plan IT's candidate listings in July 2009. He deposed that over the next ten or eleven months, he learned about more placements. In his affidavit, under the heading "Full and Frank Disclosure and Undertaking as to Damages," he says that: "the Plaintiffs did not request the Anton Piller Order at an earlier date given that Plan IT only recently learned of the linkage between Mr. Beaudoin and Worldhire Inc., the incorporation of Worldhire Inc. prior to Mr. Beaudoin's resignation and Mr. Beaudoin's role at Worldhire in or about January or February 2010."

[19] Mr. Zitek's supporting affidavit gives the impression or makes the inference that the various placements of candidates on Plan IT's candidate list with clients on Worldhire Inc.'s client lists could only be achieved by Mr. Beaudoin wrongfully providing Worldhire Inc. with Plan IT's confidential candidate and confidential client lists. However, this impression or inference was misleading, and it was not frank or fair disclosure.

[20] On July 20, 2010, the Anton Piller Order was executed at Mr. Beaudoin's home. Documents and computers were seized and removed, including Mrs. Beaudoin's private correspondence, photos, and medical records. Included in the seized material was a USB key that did contain candidate and client information that Mr. Beaudoin had gathered during his time with Plan IT. I later concluded that the commercial value of this information was much overstated.

[21] On August 4, 2010, the Defendants brought a motion to set aside the Anton Piller Order on the grounds that: (a) the Plaintiffs had made false disclosure; (b) the Plaintiffs had not satisfied the test for the Order; and (c) the terms of the Order were improper.

[22] In response, the Defendants brought a cross-motion alleging that the Defendants had breached the Anton Piller Order. The Plaintiffs alleged that Mr. Beaudoin interfered with the execution of the Anton Piller Order but these allegations, which underpinned a request for a contempt order, were eventually not made out. I later held that there was no evidence that Mr. Beaudoin was obstructionist, contemptuous, or other than adequately co-operative in the intrusion on his home.

[23] The Plaintiffs also sought an injunctive order against all Defendants, prohibiting them from contacting or contracting with any of: 80,000 employee candidates and 500 employer clients, in perpetuity.

[24] The competing motions however, were not soon argued.

[25] The main motions got sidetracked by other interlocutory activity. First, the Defendants brought a production motion, which was heard by Master Short on November 9, 2010. Master Short rejected the Plaintiffs' argument that Mr. Beaudoin had engaged in contemptuous, improper and abusive behavior and ought not to be heard on the production motion. At paragraph 80 of his Reasons for Decision he stated:

> 80. ... I see nothing improper, abusive or contemptuous in the Defendants bringing this motion. However, I am troubled by a litigant that sees nothing unsettling about seizing a party's records based on *ex parte* order and then denying them any access to those documents for the purpose of preparing the motion to set aside, while asserting that those same documents ought to have been immediately turned over to the plaintiffs.

[26] Master Short rejected the Plaintiffs' argument that a Master lacked jurisdiction to order inspection of the Plaintiffs' databases with their client lists and ordered production of the information. He reserved costs to the Judge hearing the outstanding motions.

[27] The Plaintiffs appealed Master Short's decision.

[28] While the appeal was pending, both parties attempted to bring on their competing motions. The Plaintiffs submit that they did so properly, but they submit that the Defendants' conduct was improper. In their costs submissions, the Plaintiffs state that although the Defendants had served a notice of motion to set aside the Anton Piller Order, their supporting affidavit was not sworn until November 17, 2010 and then the Defendants attempted to have their own motion argued without cross-examinations or any opportunity for the Plaintiffs to deliver a reply affidavit.

[29] In any event, there was insufficient court time to hear the motions, and on consent, the Defendants agreed to a narrow restrictive interlocutory injunction pending the return of a revised motion by the Plaintiffs that sought more – much more – extensive interlocutory relief. It seems that the Defendants thought they could live with a narrow injunctive order pending the return of a motion for more extensive relief, which they vigorously planned to resist.

[30] In the result, Justice Chapnik stayed the Anton Piller Order and granted an interim interlocutory motion restraining the Defendants from using the Plaintiffs' confidential information pending the return of the motions. She envisioned that there would be a special appointment in July 2011 where the Plaintiffs' entitlement to a continuation or an expansion of the interim injunction would be tested. Justice Chapnik's Order stated:

> 5. The Anton Piller Order and the Order of The Honorable Madam Justice Himel dated July 26, 2010, in these proceedings be and are hereby stayed, without prejudice to the Plaintiffs' pending motion originally returnable November 24, 2010, and the relief sought therein, and without prejudice to the Defendants' motion to set aside the above Orders.
>
> 6. The Defendants be and are hereby restrained from utilizing the Plaintiffs' confidential information pending the return of the special appointment whereat the Plaintiffs and Defendants' motions will be heard.

> 7. The motions by the Plaintiffs and the Defendants returnable today as well as the motions returnable on January 13 and 14, 2011, be and the same are hereby adjourned to a special appointment returnable on July 13 and 14, 2011.
>
> 8. The costs of today be and the same are hereby reserved to the Judge hearing the motions on July 13 and 14, 2011

[31] I pause here to note that my review of the Defendants' Bill of Costs reveals that between July 22, 2010, when he was retained, and the end of November 2010, John Yach, the Defendants' lawyer (called 1993), who had an hourly rate of $550.00, had expended 189.4 hours and Thomas Finlay (called 2011), then a student with an hourly rate of $150.00 had expended 11.5 hours. The Defendants are seeking full indemnity for their work during this period; i.e., $105,895, exclusive of disbursements and HST.

[32] No hearing took place in July 2011, and three years passed, during which the parties continued to wrangle about the treatment of the evidence seized during the execution of the Anton Piller Order and about the Defendants' request to inspect the documents referred to in Mr. Zitek's affidavit and, in particular, the database with information about the persons whom the Defendants were to be enjoined from doing business.

[33] The Defendants were resisting the disclosure of the seized documents until their challenge to the Anton Piller Order was heard and the Plaintiffs were resisting producing documents that had been referred to in Mr. Zitek's affidavit in support of expanding the Plaintiffs' claim for injunctive relief I query whether the positions being taken by both parties were reasonable having regard to their disclosure obligations in a civil proceeding but without resolving the merits of their respective positions, at this juncture, all I can say is that the wrangling is an example of the lack of co-operation and animosity of the parties.

[34] During the three year period, the appeal of Master Short's decision was heard by Justice Roberts on September 7, 2011. Justice Roberts set aside those parts of Master Short's Order that required the Plaintiffs to disclose the information about the client lists. She did so on the basis that Master Short did not have the jurisdiction to effectively vary or amend a Judge's Order. In paragraph 13 of her endorsement, she stated:

> In consequence, paragraphs 1, 3, 5, and 6 of the order of Master Short must be set aside. This is unfortunate because there has now been substantial delay in dealing with this matter and there should be no question that the Defendants are entitled at least to bring a motion to seek production of documents forming the basis for Mr. Zitek's supporting affidavit for the ex parte Anton Piller order, although whether any documents should be produced is a question very much in dispute between the parties."

[35] Justice Roberts rejected the Plaintiffs' argument that the Defendants were not entitled to be heard because of the alleged contempt. Justice Roberts ordered that the costs of the appeal be dealt with by the Judge hearing the outstanding motions.

[36] The Defendants appealed Justice Roberts' Order, but they did not proceed with the leave to appeal motion. Practically speaking, the appeal was abandoned.

[37] The Plaintiffs now request costs of the motion before Master Short and of the abandoned leave to appeal motion and appeal. In this regard, the Plaintiffs request partial indemnity costs of $29,331.04.

[38] Still during the three year period, in 2013, prompted by the delivery of a status hearing notice from the Court, the parties rescheduled the hearing of the dormant motions, and argument of the motions was scheduled for August 2014.

[39] On June 10, 2013, Master McAfee issued a timetabling Order for the action and the motions. Counsel for the Defendants did not attend this hearing. No Order was made for costs.

[40] In December 2013, the Defendants brought a motion for security for costs. On December 19, 2013, the Defendants served a three-volume motion record. They unilaterally selected a hearing date in March, 2014. This motion was eventually abandoned with costs assessed against the Defendants in the amount of $7,650.00.

[41] I pause again to note that my review of the Defendants' Bill of Costs reveals that between December 2010 and the end of December 2013, Mr. Yach expended 151.4 hours, Mr. Finlay expended 5.1 hours as a student and 4.7 as a lawyer with an hourly rate of $225, and Jennifer Duff (called 2003) expended 4.8 hours at an hourly rate of $350. The Defendants are claiming full indemnity of $86,795 for this period, exclusive of disbursements and HST.

[42] In January, 2014, the Plaintiffs formally brought their motion to extend and to make final and permanent the interim interlocutory injunction. Further, the Plaintiffs sought an order sealing part of the motion record, which was said to contain confidential information. And the Plaintiffs asked that the Court set a schedule for a contempt hearing for Mr. Beaudoin's alleged interference with the execution of the Anton Piller Order.

[43] In response to the Plaintiffs' motion, the Defendants formally brought a cross-motion and sought orders: (1) setting aside the Anton Piller Order; and (2) requiring the Independent Supervising Solicitor ("ISS") to return the seized documents and property, some of which was the personal and private property of Mrs. Beaudoin, who had nothing to do with her husband's business activities.

[44] The timetabling Order of Master McAfee required the Plaintiffs to set this action down for trial by January 17, 2014. The Plaintiffs requested a status hearing to extend the deadline to set this matter down for trial, and on consent on June 10, 2014, Master Glustein, as he then was, extended the set down date by one year and timetabled the motions. No order was made regarding costs.

[45] Cross-examinations followed for one day in July, 2014 (Mr. Zitek), two days in August, 2014 (Mr. Stubel and Mr. Beaudoin) and one day in November, 2014 (Mr. Beaudoin continued). The transcripts were 620 pages.

[46] In August 2014, the Plaintiffs served an Offer to Settle the competing motions. The Offer proposed the disposition of the motions as follows: (a) The Defendants consent to an injunction restraining them from employing the Plaintiffs' confidential information; (b) the Defendants consent to an adjournment of the request for a timetable for a contempt hearing; (c) the Plaintiffs consent to an Order setting aside the Anton Piller Order; (d) the Plaintiffs consent to an Order directing the ISS to return seized items; and (e) the parties agree that the transcripts of the cross-examinations of Messrs. Zitek, Beaudoin and Stubel as well as answers to outstanding questions shall be employed as discovery transcripts.

[47] The Offer to Settle was not accepted, but the August 2014 motions did not proceed, and they were adjourned to January 2015.

[48] Having regard to the Offer to Settle, the Plaintiffs request costs in the amount of $40,422.15 from August 27, 2014, payable forthwith on a partial indemnity basis. Of this sum $30,522 is for fees, $3,967.86 for HST on fees and $5,932.29 for disbursements.

[49] After the hearing in August 2014 did not proceed, more affidavit materials were filed for the hearing (there were four banker boxes of motion materials).

[50] There were two interlocutory motions in December, 2014.

[51] On December 5, 2014, on consent, Master Hawkins awarded costs for an abandoned security for costs motion.

[52] On December 30, 2014, there was a refusals motion. Master Dash made no award as to costs.

[53] Just before the motions were to be heard, notwithstanding that the Plaintiffs still wished to have Mr. Beaudoin found in contempt for interfering with the execution of the Anton Piller Order, the Plaintiffs unilaterally agreed that the Anton Piller Order should be dissolved. The Plaintiffs then submitted that the motion to set aside the Anton Piller Order was moot.

[54] Notwithstanding the Plaintiffs' concession, the motions proceeded in order to determine whether the Anton Piller Order should ever have been granted.

[55] At the hearing of the motions, the Plaintiffs abandoned their request for an expansive interlocutory injunction. Instead, they asked for a much reduced ambit of interlocutory relief. They did, however, as already noted, press forward on the request for a contempt hearing to be scheduled.

[56] I heard two days of argument and reserved judgment.

[57] I pause again to note that my review of the Defendants' Bill of Costs reveals that for the period between January 1, 2014 and the end of the argument on January 20, 2015, Mr. Yach expended 258.1 hours, Mr. Finlay 73.3 hours, and Ms. Duff 12 hours. The Defendants' full indemnity claim for this period is $162,648.00, exclusive of disbursements and HST.

[58] I released my reasons on January 28, 2015. I concluded that but for the fact that the Anton Piller Order and the Interim Injunction Order were obtained as a result of an *ex parte* hearing, they should never have been granted. I concluded that the Plaintiffs did not make out a case for sealing any of its motion material, which might be proprietary but was not confidential, and they did not make out a case that Mr. Beaudoin's conduct in relation to the Anton Piller Order was contemptuous.

[59] On the Anton Piller motion, I was satisfied that there was a *prima facie* case or at least a serious issue to be tried that Mr. Beaudoin breached the Consulting Services Agreement and his common law obligations as an employee during his tenure of employment with the Plaintiffs. See *Boehmer Box L.P. v. Ellis Packaging Ltd.*, [2007] O.J. No. 1694 (S.C.J.). I was satisfied that the Plaintiffs had shown a serious issue to be tried that Mr. Stubel and Worldhire Inc. were complicit in Mr. Beaudoin's and Beaudoin's Corporation's wrongdoing.

[60] Because it has some relevance to the exercise of my discretion with respect to costs and when they should be payable, I now add that in the light of the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, Mr. Beaudoin may be

exposed to a finding that he breached a common law duty that applies to all contracting parties to act honestly in the performance of contractual obligations.

[61] I am not to be taken as making any finding about the ultimate merits of the Plaintiffs' claim, and at this juncture, the relevance of *Sattva Capital* is only that the Defendants have made an issue of the conduct of Mr. Zitek while there is some doubt about the purity of their own conduct as a contracting party.

[62] I concluded that while there may have been a serious issue to be tried that Mr. Beaudoin had breached his duties as an employee or breached the restrictive covenants in his employment contract; however, the Plaintiffs could not in 2010, and did not in 2015, establish any irreparable harm. I concluded that the balance of convenience never favoured the granting of an interlocutory injunction. I concluded that the interlocutory injunction should be dissolved and not extended. Further, I held that the Plaintiffs did not make adequate disclosure to the Court, and that circumstance provided another reason for terminating the injunctive orders as did the inordinate delay in getting the action to trial.

[63] I set aside the Anton Piller Order and the interim interlocutory order that was granted in November 2010. I dismissed the Plaintiffs' motion. I granted the Defendants' cross-motion. I invited the parties to make costs submissions.

[64] I have noted above a partial breakdown of the Defendants' claim for full indemnity costs. Mr. Yach also expended 41.5 hours preparing the Bill of Costs and the Defendants' Costs Submissions. The full indemnity request for these services is $22,825, exclusive of disbursements and HST.

[65] The Defendants claim disbursements of $33,451.43, exclusive of HST, of which the major items are: (a) travel expenses of $13,174.69; (b) expert report $4,163.75; (c) examiner fees $3,402.50; (d) photocopying $2,695.25; (e) computer assisted legal research $2,530.11; (f) court run $2,017.69; (g) transcript fees $1,451.70; and (h) bailiff fees $1,127.66.

[66] Of these disbursements, there is no explanation of what a "court run" is and why a bailiff was retained by the Defendants responding to an Anton Piller motion.

C. DISCUSSION AND ANALYSIS

[67] The Defendants' lawyers docketed 727.9 hours for the various attendances associated with the Anton Piller Order and the competing motions. The Defendants submit that they are entitled to full indemnity because of Mr. Zitek's failure to make proper disclosure. They submit that Mr. Zitek and the Plaintiffs perpetrated a fraud on the Court in obtaining an *ex parte* Anton Piller Order.

[68] While I was of the view and continue to be of the view that Mr. Zitek, as the principal of the Plaintiffs, did not make proper disclosure to the Court, and while I am of the view that he was very ill-advised to let his anger and perhaps embarrassment at what he perceived to be Mr. Beaudoin's disloyalty and dishonesty get much the better of him, I do not believe that either he or the Plaintiffs' lawyers were attempting to perpetrate a fraud on the Court.

[69] Defrauding the Court is a very serious allegation, and I think that frustration and unmerited righteous indignation in being embroiled in litigation has gotten the better of the Defendants and their lawyer in making that allegation.

[70] I make no finding on the merits beyond what I found on the motions that the Plaintiffs had shown that there was a *prima facie* case or at least a serious issue to be tried that Mr. Beaudoin breached the Consulting Services Agreement and his common law obligations as an employee during his tenure of employment with the Plaintiffs, but I think it behoves a litigant who it appears was being paid commissions for almost six months while he was setting up a rival business to his employer's business should show some caution in accusing his employer of reprehensible conduct and of abusing its right to obtain relief from the Court for what may turn out to be a successful claim for breach of contract and misappropriation of property.

[71] The merits of the Plaintiffs' claim remain to be determined, and the Defendants may have strong defences, but the Defendants should not be emboldened to claim an excessive and unreasonable award of costs by their success on an Anton Piller motion that was fatally flawed.

[72] The Defendants were the successful party on interlocutory motions, and they are entitled to costs in accordance with the normal principles that guide the Court's discretion.

[73] And, in my opinion, the costs award should be punitive because of Mr. Zitek's failure to make proper disclosure, some of which he acknowledged and corrected. But the Plaintiffs may ultimately succeed in their action, and, in my opinion, the appropriate sanction is to make the Plaintiffs liable for costs of $100,000 on a partial indemnity scale for their failed interlocutory proceedings payable to the Defendants in any event of the cause.

[74] I arrive at the $100,000 figure by reviewing the various items of the Defendants' Bill of Costs. Having done so, I think there is merit in the Plaintiffs' various submissions to the end that the costs being claimed are excessive and unreasonable. From my role case managing class actions, I have some experience with complex and expensive interlocutory motions, and I cannot see any justification for expending almost a half a million dollars for an interlocutory motion for what, at the end of the day, is an employer-employee dispute.

[75] I would add that from my review of the Bill of Costs and of the costs submissions and from my understanding of the procedural record leading to the Anton Piller motions, the responsibility for the disproportionate amount of time and energy spent is a mutually shared responsibility. Both parties were not co-operative, and both parties appear to have gotten into the muddy pigpen of ill-tempered, acrimonious litigation. Both parties appear to have seized opportunities to discomfort and provoke one another.

[76] In my opinion, $100,000, all inclusive on a partial indemnity basis is a fair and reasonable award in the circumstances. The Defendants were successful on the interlocutory motions. The Plaintiffs' attempt at interlocutory relief was overreaching and posed a serious threat to the livelihood of the Defendants. An Anton Piller Order is inherently invasive, and the Plaintiffs could reasonably anticipate that their aggressive litigation strategy would be met with an aggressive and fulsome response from the Defendants. The record for these costs submissions, suggests that had the Plaintiffs been successful, they would have claimed at least $100,000.

[77] The Plaintiffs' Offer to Settle does not provide a reason for setting off or reducing the costs award to the Defendants. It was reasonable for the Defendants to ignore the Offer which was not dispositive of the interlocutory dispute between the parties and kept alive the Plaintiffs' proposed contempt proceeding.

[78] The circumstances of the various Orders associated with Master Short's decision, the appeal and the abandoned leave to appeal, however, are worthy of a costs award to set off against the award being made in the cause to the Defendants. I, therefore, award the Plaintiffs $10,000 payable in the cause.

[79] Order accordingly.

D. CONCLUSION

[80] In the context of its costs submissions, the Plaintiffs asked that I make an order that this litigation be case managed and that the transcripts from the cross-examinations be treated as examinations for discovery.

[81] I made no orders in this regard. If the Plaintiffs wish this relief, they should bring the appropriate motion.

Perell, J.

Released: April 23, 2015

CITATION: 1483860 Ontario Inc. (Plan IT Search) v. Beaudoin, 2015 ONSC 2662
COURT FILE NO.: CV-10-405615
DATE: 20150423

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1483860 ONTARIO INC., o/a Plan IT Search and 6573908 CANADA INC., o/a Plan IT Search Inc.

Plaintiffs

– and –

JAMES BEAUDOIN, 2103235 ONTARIO INC., WORLDHIRE INC., MASON STUBEL and PATRICIA BEAUDOIN

Defendants

REASONS FOR DECISION – COSTS

PERELL J.

Released: April 23, 2015

TAB E

-------- Original message --------
From: "Milne-Smith, Matthew" <MMilne-Smith@dwpv.com>
Date:03-05-2015 6:48 PM (GMT-05:00)
To: Rocco DiPucchio <rdipucchio@counsel-toronto.com>
Cc: jeff.mitchell@dentons.com, andy.pushalik@dentons.com
Subject: West Face

Rocco,

Just wanted to let you know I'll be acting for West Face on the upcoming motion. We'll be serving a Notice of Change along with responding motion materials indicating that we are now co-counsel with Dentons.

I think that Rob Centa or Kris Borg-Olivier has mentioned to Andrew that we are going to have a lot of materials and a lot of cross-examinations to do. Can you give me a call tonight to talk logistics? We have a lot of moving parts and need to fix them in place very soon in order to fit them all in on the existing schedule. You can reach me on my cell at 647.393.5595 after 7:30.

Matt

Sent from my iPad

Matthew Milne-Smith

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DAVIES WARD PHILLIPS & VINEBERG LLP

TAB F

Divisional Court File No. 541/14
Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

NOTICE OF CHANGE OF LAWYER

The defendant Brandon Moyse formerly represented by Jeff C. Hopkins and Justin Tetreault of Grosman Grosman & Gale LLP, has appointed Chris G. Paliare, Robert A. Centa, Kristian Borg-Olivier of Paliare Roland Rosenberg Rothstein LLP as lawyers of record.

February 18, 2015

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West Face Capital Inc.

Divisional Court File No. 541/14
Court File No. CV-14-507120

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

NOTICE OF CHANGE OF LAWYER

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Lawyers for the Defendant, Brandon Moyse

TAB G

Court File No. CV-14-507120

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendant

COSTS OUTLINE

The Defendant and Responding Party, West Face Capital Inc. ("**West Face**"), provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

	Substantial	Partial	Actual
Fees (as detailed below)	$89,767.00	$60,680.00	$99,710.00
Counsel fee for appearance (4.5 hours)	$3,978.00	$2,655.00	$4,432.50
Sub-Total	$93,745.00	$63,335.00	$104,142.50
H.S.T. (13%)	$12,186.85	$8,233.55	$13,538.53
Disbursements (as detailed in the attached appendix)	$6,457.97	$6,457.97	$6,457.97
Total	$112,389.82	$78,026.52	$124,139.00

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

N/A

- the complexity of the proceeding

An injunction for the enforcement of a restrictive covenant in the context of employment requires a thorough examination of the facts and the law underlying the Plaintiff's claim in the action. Moreover, the Plaintiff also sought the extraordinary remedy of a forensic investigation of the Defendant, Brandon Moyse's, electronic devices.

- the importance of the issues

The Moving Party is seeking an injunction against Moyse to enforce broadly worded non-competition and confidentiality provisions contained in his employment contract. Enforcement of these provisions would prevent Moyse from working in any field in which he would have the requisite experience to work. The desired remedy of a forensic investigation of Moyse's electronic devices represents a significant intrusion on Moyse's privacy.

- the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

N/A

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

N/A

- a party's denial of or refusal to admit anything that should have been admitted

N/A

- the experience of the party's lawyer

Jeff Mitchell ("**JPM**"): called in 1998 Andy Pushalik ("**AGP**"): called in 2007 Matthew Curtis ("**MJGC**"): called in 2009 (British Columbia); 2012 (Ontario)

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS	PERSONS	HOURS	SUBSTANTIAL INDEMNITY RATE	PARTIAL INDEMNITY RATE	ACTUAL RATE
Preparation of Motion Materials: Review of Moving Party's motion materials. Preparation for motion, including research and preparation of affidavits, motion record, and correspondence with opposing counsel and client. Draft factum and prepare book of authorities. Ongoing discussions regarding legal argument and	JPM	26	$510.00 =$13,260.00	$340.00 =$8,840.00	$570.00 =$14,820.00
	AGP	50	$390.00 =$19,500.00	$260.00 =$13,000.00	$430.00 =$21,500.00
	MJGC	15	$374.00 =$5,610.00	$250.00 =$3,750.00	$415.00 =$6,225.00

strategy.					
July 17, 2014 Motion Court Appearance Before Mr. Justice Firestone: Preparation for, and attendance at, motions court.	JPM MJGC	8.0 6.0	$510.00 =$4,080.00 $374.00 =$2,244.00	$340.00 =$2,720.00 $250.00 =$1,500.00	$570.00 =$4,560.00 $415.00 =$2,490.00
Cross-Examinations on Affidavits and Answers to Undertakings: Preparation of Notices of Examination. Preparation of Cross-Examination of J. Riley, M. Musters, T. Dea and A. Sing. Attend at Cross-Examinations. Review transcripts to prepare answers to undertakings and under advisements. Review and receive documents and answers and prepare same. Review answers to undertakings.	JPM AGP MJGC	27.0 16.0 8.0	$510.00 =$13,770.00 $390.00 =$6,240.00 $374.00 =$2,992.00	$340.00 =$9,180.00 $260.00 =$4,160.00 $250.00 =$2,000.00	$570.00 $15,390.00 $430.00 =$6,880.00 $415.00 =$3,320.00
Preparation of Factum:	JPM	7.0	$510.00	$340.00	$570.00

Review Plaintiff's Factum. Revise and expand factum. Review legal research.	AGP MJGC	10.0 10.0	=$3,570.00 $390.00 =$3,900.00 $374.00 =$3,740.00	=$2,380.00 $260.00 =$2,600.00 $250.00 =$2,500.00	=$3,990.00 $430.00 =$4,300.00 $415.00 =$4,150.00
August 7, 2014 Motion Court Appearance Before Madam Justice Pollak: Preparation for and attendance at motions court.	MJGC	6.0	$374.00 =$2,244.00	$250.00 =$1,500.00	$415.00 =$2,490.00
August 12, 2014 Motion Scheduling Court Appearance: Preparation for and attendance at motion scheduling court	JPM	1.5	$510.00 =$765.00	$340.00 =$510.00	$570.00 =$855.00
October 10, 2014 Motion Court Appearance Before Mr. Justice Lederer: Preparation for and attendance at motion scheduling court	JPM MJGC	8.0 8.0	$510.00 =$4,080.00 $374.00 =$2,992.00	$340.00 =$2,720.00 $250.00 =$2,800.00	$570.00 =$4,560.00 $415.00 =$3,320.00
Preparation of Costs Outline: Review and revise costs outline.	AGP	2.0	$390.00 =780.00	$260.00 =520.00	$430.00 =$860.00

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: December 15, 2014

Dentons Canada LLP
Per: Jeff Mitchell

Lawyers for the Defendant,
West Face Capital Inc.

APPENDIX "A"

DISBURSEMENTS

Description	Total
Court Filing Fee *non-taxable*	$127.00
Process Server Fee	$240.00
Laser printing	$3,240.75
Court Reporting Services	$2,044.74
Photocopies	$608.50
Fax Charges	$15.00
Long Distance Telephone Charges	$17.28
Binding	$143.40
Courier	$21.30
TOTAL	**$6,457.97**

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.

Defendant
(Respondents)

COSTS OUTLINE OF THE RESPONDENT BRANDON MOYSE

The Defendant, Brandon Moyse provides the following costs outline. He submits that costs should be reserved to the trial judge and awarded in the cause:

Fees (as detailed below)	$	57,687.63 (incl. HST) (partial indemnity)
Estimated lawyer's fee for appearance	$	included
Disbursements (as detailed in the attached appendix)	$	3,538.12 (incl. HST)
Total	$	61,225.75 (incl. HST)

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

n/a

- the complexity of the proceeding

n/a

- the importance of the issues

As a motion to prevent him from holding gainful employment and to conduct an intrusive search into his personal electronic equipment, the subject matter is of the utmost importance to Mr. Moyse and required a full and comprehensive response.

- the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding

n/a

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

n/a

- a party's denial of or refusal to admit anything that should have been admitted

n/a

- the experience of the party's lawyer

JCH: Jeff C. Hopkins called to the Bar 2003

JT: Justin Tetreault called to the Bar 2011

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS *(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)*	PERSONS *(identify the lawyers, students, and law clerks who provided services in connection with each item together with their year of call, if applicable)*	HOURS *(specify the hours claimed for each person identified in column 2)*	PARTIAL INDEMNITY RATE *(specify the rate being sought for each person identified in column 2)*	ACTUAL RATE*
Correspondence with opposing counsel and counsel for West Face	JCH JT	16.7 2.6	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Correspondence with client	JCH JT	10.9 6.4	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Reviewing motion materials of other parties	JCH JT	11.6 5.7	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Research	JT	25.5	$165.00/hr	$275.00/hr
Preparing responding motion materials (motion record, affidavit, factum, book of authorities, supplementary affidavit)	JCH JT	8.3 36.6	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Preparation for and attendance at hearings (July 16, Aug 7, Aug 12, Oct 10 and Oct 27)	JCH JT	39.0 20.3	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Preparing Affidavit of Documents	JCH JT	1.5 6.3	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Preparing for and conducting cross-examinations. Reviewing transcripts	JCH JT	34.1 21.2	$240.00/hr $165.00/hr	$400.00/hr $275.00/hr
Preparing costs outline and drafting cost submissions	JT	7.2	$165.00/hr	$275.00/hr
Sub-Total	JCH JT	122.1 131.8	$51,051.00	$85,085.00
H.S.T.			$6,636.63	$11,061.05
Total			$57,687.63	$96,146.05

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: Dec 5/14

Signature of lawyer

DISBURSEMENTS INCURRED BY GG&G LLP	**AMOUNT**
Fax Charger	$22.00
Quicklaw	$169.68
Process Server	$455.00
Printing Costs	$927.55
Photocopying Costs	$92.75
Courier Charges	$20.00
Court Reporter and Transcripts	$1,444.10
Pre-Tax Total	$3,131.08
13% HST	$407.04
TOTAL	$3,535.12

TAB H

Court emphasized the principle of proportionality, and the need to deal with a case in a manner that is proportionate to what is involved. The Court concluded that Rule 57.01 (1)(e) and (i) was broad enough to capture the consideration of proportionality when considering costs.

15. If costs are awarded, West Face submits that the appropriate range is $50,000.00 for fees, plus reasonable disbursements and applicable HST. Such an amount reflects the principle of proportionality recognized in *Mason v. Chem-Trend Ltd. Partnership*, and in addition that:

(a) Catalyst was successful in part, but also was not wholly successful in obtaining all of its claims for relief;

(b) The Defendants did nothing in the course of the litigation to prolong the litigation, nor did the Defendants take any steps or other actions that were not appropriate;

(c) An award of substantial indemnity costs should only be made in exceptional circumstances; and

(d) It is appropriate to exercise restraint in the award of costs, as the matter has not been finally determined, nor have Catalyst's claims been fully adjudicated.

SUMMARY

16. For the reasons above, West Face submits that costs should be in the cause. In the alternative, West Face submits that all costs should be assessed on a partial indemnity basis, and that the costs claimed by Catalyst be reduced as set out above.

All of which is respectfully submitted this 15th day of December, 2014

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Lawyers for the Defendant,
West Face Capital Inc.

TAB I

See pp. 3+4

2011 ONSC 839
Ontario Superior Court of Justice

Mason v. Chem-Trend Ltd. Partnership

2011 CarswellOnt 957, 2011 ONSC 839, 198 A.C.W.S. (3d) 923, 89 C.C.E.L. (3d) 78

Mason and Chem-Trend Limited Partnership

Kruzick J.

Judgment: February 8, 2011
Docket: 8352/09

Proceedings: additional reasons to *Mason v. Chem-Trend Ltd. Partnership* (2010), 2010 ONSC 4119, 2010 CarswellOnt 6363, 84 C.C.E.L. (3d) 311, 2011 C.L.L.C. 210-005 (Ont. S.C.J.)

Counsel: John R. Evans, K.C. Wysynski for Applicant
Norman J. Emblem, Tiffany D. Soucy for Respondent

Subject: Employment; Public; Civil Practice and Procedure

Related Abridgment Classifications

2011 ONSC 839, 2011 CarswellOnt 957, 198 A.C.W.S. (3d) 923, 89 C.C.E.L. (3d) 78

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Practice and procedure — Costs — Entitlement to costs

Employee brought wrongful dismissal action against his former employer — Employee brought unsuccessful application to have restrictive covenant declared unenforceable — Application was argued as long motion and required day — Parties made submissions concerning costs, with employer seeking costs of $175,000 on partial indemnity scale, and employee seeking costs on substantial indemnity basis of $25,000 — Costs awarded to employer in amount of $17,000, payable to employer by employee in cause — Employer was successful on application — However, in looking at amount claimed, principle of proportionality was borne in mind — In other words, parties had to deal with case in manner that was proportionate to what was involved — Rules 57.01(e) and (i) of Rules of Civil Procedure were broad enough to capture consideration of proportionality when considering costs — Amount sought by employer was excessive.

Table of Authorities

Cases considered by *Kruzick J.*:

Tucci v. Pugliese (2010), 2010 ONSC 2144, 2010 CarswellOnt 3826 (Ont. S.C.J.) — referred to

Statutes considered:

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(1) — referred to

R. 57.01(1)(e) — referred to

R. 57.01(1)(i) — referred to

ADDITIONAL REASONS to judgment reported at *Mason v. Chem-Trend Ltd. Partnership* (2010), 2010 ONSC 4119, 2010 CarswellOnt 6363, 84 C.C.E.L. (3d) 311, 2011 C.L.L.C. 210-005 (Ont. S.C.J.), concerning costs.

***Kruzick J.*:**

Background

1 This was an Application by the Applicant, Mason, to have a restrictive covenant, signed June 18, 1992, declared unenforceable. The motion arises out of a wrongful dismissal action commenced by Mason against his former employer, Chem-Trend. In summary, Mason sought relief from a one year restriction, following his termination, restricting him from competing with his former employer or dealing with customers and business entities of his former employer.

2 The application was argued as a long motion and required the day. Reasons were released August 26, 2010. I invited counsel to make submissions in writing on costs if they could not agree.

3 Since then counsel have made submissions in writing on costs and then made a request to re-attend before me. As a result a hearing date was scheduled on January 31, 2011. On consent, that date has now been adjourned without a date. Having not heard further, this is my decision on costs.

Submissions

4 Chem-Trend seeks costs on the grounds that it was successful on the application. Chem-Trend argues the general principle that a successful party is entitled to their costs and that there is no reason to deviate from this general principle.

5 The amount sought by Chem-Trend is $175,000.00, on a partial indemnity scale.

6 Mason seeks costs on a substantial indemnity basis of $25,000.00 on the basis that the position taken by Chem-Trend in these circumstances was unreasonable. In the alterative, Mason argues that the facts of this case are such that no costs should be awarded. If costs are awarded, Mason submits that the appropriate range is $8,000.00 to $12,000.00.

Costs Awards

7 I bear in mind the overall objectives of assessing costs so that the award is fair and reasonable in the circumstances. In exercising the court's discretion under section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, I am guided by the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

8 Here Chem-Trend was successful on the application. However, in looking at the amount claimed, I bear in mind the principle of proportionality. In other words, the parties must deal with a case in a manner that is proportionate to what is involved. I am of the view that Rule 57.01 (1)(e) and (i) are broad enough to capture the consideration of proportionality when considering costs. See also *Tucci v. Pugliese*, [2010] O.J. No. 2432 (Ont. S.C.J.). I find the amount as sought by Chem-Trend here is excessive.

Disposition

9 In the exercise of my discretion, I award costs to Chem-Trend in the amount of $17,000.00 payable to Chem-Trend by Mason in the cause.

Order accordingly.

End of Document

TAB J

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 1146
COURT FILE NO.: CV-14-507120
DATE: 20150220

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC.

Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

BEFORE: Mr. Justice Lederer

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

Jeff C. Hopkins & Justin Tetreault, for the Defendant, Brandon Moyse

Jeff Mitchell & Matthew J.G. Curtis, for the Defendant, West Face Capital Inc.

COSTS ENDORSEMENT

[1] This was a motion for an interlocutory injunction. The plaintiff succeeded. It seeks costs on a substantial indemnity scale, in the amount of $155,295.40. The two defendants point out that, as an interlocutory order, the final disposition of the issues is not known. They say that there is no basis for costs to be awarded at an elevated scale and that they should, in any event, be in the cause.

[2] The rationale for the claim for the higher scale is the determination that the actions of the defendants detracted from their ability to succeed on the motion. The approach was such that equity did not balance in their favour. Be that as it may, I am not prepared to find that the conduct of these parties was so egregious that it should be the cause of an increased award of costs.

[3] It is also fair to observe that the substance of the decision is that there is a serious issue to be tried. It may be that, in the end, the defendants will be successful in demonstrating that the non-competition clause is not enforceable and that, in any event, whatever occurred there was no damage to Catalyst. In such circumstances, it may even be that the defendants will seek to rely on the undertaking as to damages made on behalf of Catalyst in support of the granting of the injunction.

[4] In such circumstances, it would not be appropriate for Catalyst to be paid for the costs of an injunction, where the cause for it was not, in the end, validated. On the other hand, these costs were added, if not caused, by the actions of the defendants. Certainly, some of them could have been avoided.

[5] I award costs to the plaintiff in the cause in the amount of $75,000.

LEDERER J.

Date: 20150220

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

PLAINTIFF'S COSTS SUBMISSIONS
(MOTION HEARD JULY 2, 2015)

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