Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/Responding Parties

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

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PART I - OVERVIEW

1. Catalyst asked the Court to grant it two invasive interlocutory injunctions against West Face. Its motion was dismissed in its entirety. West Face seeks a costs award on a partial indemnity basis for $175,000 (inclusive of HST) plus disbursements.

2. This award is fair and reasonable in the circumstances. Catalyst transformed a departing-employee case into high-stakes litigation concerning, among other things, control over WIND Mobile. Catalyst also demanded that West Face produce for imaging and review all electronic devices used by its employees. Catalyst sought this relief based on allegations of very serious misconduct, including misappropriation and misuse of confidential information, market manipulation, and spoliation.

3. Speculative accusations of misconduct are easy to make. Disproving those accusations is hard work. West Face did so with compelling and voluminous evidence. Catalyst still proceeded on speculative grounds, without providing an undertaking as to damages. All West Face seeks is to be fairly compensated for a fraction of the expenses that it incurred.

PART II - GENERAL PRINCIPLES REGARDING COSTS ON INJUNCTION MOTIONS

4. The costs of Catalyst's motion are in the discretion of the Court.[1] In exercising its discretion to award costs, the Court must produce a result that is fair and reasonable in all of the circumstances.[2] Pursuant to Rule 49.13, the Court may take into account any written offer to settle, whether or not the costs consequences of Rule 49.10 apply.[3]

5. Special considerations apply to costs awards for unsuccessful interlocutory injunctions. Orkin's *The Law of Costs* notes that an interlocutory injunction "ought to be sought with caution and granted sparingly".[4]

6. The Court may consider a broad range of factors in exercising its discretion to award costs under Rule 57.01. The result of the motion and the principle of indemnity are self-explanatory. The remaining relevant factors are discussed below.

A. The Amount of Costs that Catalyst Could Reasonably Have Expected to Pay

7. Catalyst brought a high-stakes motion. Through the Management Injunction, it sought to shut West Face out of WIND.[5] The injunction would have caused significant harm to both West Face and WIND. As initially framed, Catalyst also sought to forbid West Face's participation in the AWS-3 spectrum auction.[6]

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1 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131 and *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.01.

2 *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 at paras. 24-26 (C.A.).

3 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 49.13.

4 Mark M. Orkin, *The Law of Costs*, 2d ed., Vol. II (Toronto: Canada Law Book, 2015) at 4-35.

5 As noted in paragraph 40 of the Endorsement, West Face is the largest single investor in WIND, designates two of the ten seats on its board of directors, and plays an important role in the company's governance, strategic and capital funding direction. While Catalyst narrowed the Management Injunction to a "Voting Injunction" in its factum, West Face had to prepare up until that point for the broader relief sought.

6 An event Mr. Riley described as a "unique, one-time, extremely valuable opportunity".

8. Catalyst's initial request for an *Anton Piller* Order sought to have an ISS forensically image over 172 West Face devices before the parties had even exchanged Affidavits of Documents. This would have been onerous, time-consuming, expensive, and disruptive.

9. Given the drastic relief sought by Catalyst, the media publicity surrounding the allegations against West Face,[7] and the high stakes for West Face, Catalyst should reasonably have expected that West Face would incur significant expense to oppose the motion.

B. The Complexity of the Motion

10. Catalyst specifically accused West Face of using misappropriated confidential information to engage in three distinct transactions: WIND, Callidus, and Arcan. To respond, West Face could not simply issue blanket denials. It had to prove that it did not receive or misuse Catalyst's confidential information by re-constructing the hiring of Mr. Moyse, its acquisition of WIND, its investment in Arcan, and its Callidus research.[8]

C. The Remaining Factors

11. The remaining factors include: (i) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the motion; (ii) whether any step was improper, vexatious, or unnecessary; (iii) a party's denial of or refusal to admit anything that should have been admitted; and (iv) any settlement offers. Together, these factors support West Face's costs request as reasonable in the circumstances.

12. Catalyst commenced the motion on January 13, 2015 based on the number of "hits" resulting from the ISS's forensic review of Mr. Moyse's electronic devices using generic search terms, less than three weeks before the scheduled release of the ISS's initial report on January 30. Catalyst had no evidence of any confidential information that West Face acquired relating to WIND, the AWS-3 auction, or Callidus – only speculation.

13. The ISS found no evidence that West Face received confidential information from Mr. Moyse (a conclusion confirmed in the final report on February 17). Catalyst resisted West Face's efforts to receive a copy of the ISS's report until February 26, just 11 days before West Face's responding motion record was due.[9]

14. West Face gave an advance copy of its Responding Motion Record to counsel to Catalyst, who objected to the contents as they related to Callidus. To avoid further expense, and embarrassment to Catalyst, West Face offered not to file its response to the Callidus allegations if Catalyst agreed to abandon them and pay West Face costs of $25,000.[10]

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7 Griffin Affidavit, at paras. 129-132, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 50-52.

8 Paragraph 56 of the Endorsement noted the voluminous West Face productions that were necessary to respond to Catalyst's allegations. In light of these accusations and the evidence of Mr. Musters (which tested the boundaries of his expertise), West Face also had to retain a forensic expert.

9 West Face consistently complied with Court-ordered filing deadlines while Catalyst, for a variety of reasons, did not. The long delay in bringing this matter to a hearing increased West Face's costs.

10 The email correspondence including West Face's offer to settle, and Catalyst's rejection of it, is attached at Schedule "C". This correspondence was filed by Catalyst in Catalyst's Supplementary Motion Record, Tab D. West Face's Callidus-related costs at this point were of course already much more than $25,000.

15. In the face of West Face's meticulously documented Callidus research and offer, Catalyst persisted. It then focused on the irrelevant issue of whether West Face's opinions about Callidus were well-founded,[11] unnecessarily increasing costs.

16. Indeed, Catalyst should have discontinued its entire motion upon receipt of: (a) West Face's Responding Motion Record; (b) a USB key with all Moyse-related emails on March 13, 2015; and (c) West Face's offer to produce to the ISS all of Mr. Moyse's documents on West Face's servers.

17. Ultimately, Catalyst abandoned or at least narrowed every aspect of its motion, after West Face had already incurred time and expense in responding to them. Catalyst never pursued its request for an AWS-3 spectrum auction injunction. In its factum, Catalyst narrowed the scope of the Management Injunction to enjoining West Face from voting its shares in WIND; and the scope of the *Anton Piller* Order to a forensic image of West Face's servers and the electronic devices of five individuals.[12]

D. Comparable Cases

18. The costs sought by West Face are comparable to other hard-fought, high-stakes injunction motions. See, for example, *Omega Digital Data Inc. v. Airos Technology Inc.* ($200,000);[13] *Jazz Air LP v. Toronto Port Authority* ($160,000);[14] *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.* ($161,936),[15] *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)* ($185,000),[16] and *Verge Insurance Brokers Ltd. v. Sherk* ($255,237).[17]

E. Relief Sought

19. West Face seeks its partial indemnity costs of $175,000 (inclusive of HST) plus disbursements, payable forthwith. The costs of the motion before Justice Lederer were awarded in the cause because "the substance of the decision is that there is a serious issue to be tried".[18] It was therefore possible for the defendants to establish at trial that the injunction ought not to have been granted.

20. No such possibility exists on this motion. Catalyst failed to meet the threshold requirements of irreparable harm and an undertaking as to damages. A trial cannot reverse those findings. This is a motion that ought not have been brought and for which West Face should be compensated forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of July, 2015.

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11 An issue now also the subject of a second action, for defamation.

12 During the cross-examination of Mr. Griffin, Catalyst also accused West Face's IT director, Chap Chau, of spoliation. This necessitated a responding affidavit from Mr. Chau. See the Chau Affidavit, Joint Supplementary Responding Motion Record of the Defendants, Tab 18.

13 *Omega Digital Data Inc. v. Airos Technology Inc.*, [1997] O.J. No. 6288 at paras. 9-10 (S.C.J.).

14 *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809 at paras. 1, 17, & 21 (Div. Ct.).

15 *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.* [2007] O.J. No. 2137 at paras. 5 & 16 (S.C.J.).

16 *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2008] O.J. No. 374 at para. 33 (S.C.J.).

17 *Verge Insurance Brokers Ltd. v. Sherk*, [2013] O.J. No. 5889 at para. 260 (S.C.J.).

18 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 1080 at para. 3 (S.C.J.).

SCHEDULE A

SCHEDULE A
LIST OF AUTHORITIES

1. *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.* [2007] O.J. No. 2137 (S.C.J.)

2. *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.

3. *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 1080 (S.C.J.)

4. *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809 (Div. Ct.)

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

6. *Omega Digital Data Inc. v. Airos Technology Inc.*, [1997] O.J. No. 6288 (S.C.J.)

7. Orkin, Mark M., *The Law of Costs*, 2d ed., Vol. II (Toronto: Canada Law Book, 2015) at 4-35

8. *Verge Insurance Brokers Ltd. v. Sherk*, [2013] O.J. No. 5889 (S.C.J.)

TAB 1

Case Name:

Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.

RE: Air Canada Pilots Association (Plaintiff), and Air Canada Ace Aviation Holdings Inc., Robert A. Milton, Montie R. Brewer, Marvin Yontef, David I. Richardson, Carlton D. Donaway and The Director appointed under the Canada Business Corporations Act (Defendants)

[2007] O.J. No. 2137

31 B.L.R. (4th) 155

32 C.B.R. (5th) 115

60 C.C.P.B. 234

157 A.C.W.S. (3d) 925

2007 CarswellOnt 3443

Court File No. 06-CL-6672

Ontario Superior Court of Justice

P.A. Cumming J.

May 30, 2007.

(16 paras.)

Civil procedure -- Costs -- Party and party or partial indemnity -- Disbursements -- Assessment or fixing of costs -- Considerations -- Payable forthwith -- Application by the defendants for costs upon their success in two motions allowed in part -- Defendants claimed total partial indemnity costs of $238,913 and were awarded total partial indemnity costs of $161,936, to be paid forthwith.

Application by the defendants for costs -- Defendants were successful in having the motion for injunctive relief by Air Canada Pilots Association dismissed -- They were also successful in their

cross-motion that the Association was not a proper person to bring an oppression claim -- Stakes were extremely significant as the oppression claim put into issue and in jeopardy the entire extensive 2004 Air Canada corporate restructuring -- Issues on the motion for injunctive relief were complex from a legal and factual perspective -- Defendants claimed substantial indemnity costs of $301,045 or partial indemnity costs of $205,208 on the injunction motion -- They also sought substantial indemnity costs of $55,270 or partial indemnity costs of $33,705 on a partial indemnity basis for the cross- motion -- Association submitted that costs should be fixed at $25,000 for each motion or the costs should be referred for an assessment -- HELD: Application allowed in part -- Court agreed with the defendants' position that the matters to be determined on the cross-motion could not be separated from the injunction motion -- Given the complexity and importance of the interrelated issues it was necessary to involve a number of lawyers with different expertise and specializations and to have collaborative review and opinions -- It was appropriate for the judge to fix the costs, rather than refer the matters for an assessment, given the tremendous complexity of the subject proceedings -- There would be significant delay and further unnecessary costs would be incurred if the matters were referred for an assessment -- Partial indemnity costs were awarded -- Two motions were sufficiently interrelated so that it was appropriate to divide the costs between them rather than allocate the costs primarily to the injunction motion -- Overall costs were divided because there could be consequences on appeal which necessitated such an allocation -- Costs payable to the defendants for each of the motions were set at $70,000 for fees, GST of $4,200 and $6,768 for disbursements -- Total costs of $161,936 were payable forthwith.

Counsel:

Richard B. Jones and ***Lynsey Connors,*** for the Plaintiff.

Sean Dunphy and ***Kathy Mah,*** for the Defendants other than The Director appointed under the *Canada Business Corporations Act*.

ENDORSEMENT ON COSTS

1 P.A. CUMMING J.:-- I have received written costs submissions in respect of the above matter. See my Reasons for Decision in *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.,* [2007] O.J. No. 89.

General Principles in Awarding Costs

2 Costs are in the discretion of the Court: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are generally awarded on a partial indemnity basis; and third, that costs are payable forthwith i.e. within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.

3 Rule 57.01(1) lists a broad range of factors for the court to consider, including the result achieved in the proceeding, the complexity of the proceeding, the importance of the issues and whether any step in the proceeding was improper, vexatious or unnecessary. In exercising its

discretion, a court must produce a result that is fair and reasonable in all the circumstances: *Boucher v. Public Accountants Council (Ontario)*, (2004), 71 O.R. (3d) 291 (C.A.).

The submissions as to costs

4 The defendants were successful in having the motion for injunctive relief of the plaintiff Air Canada Pilots Association ("ACPA") dismissed and also successful in their cross-motion that ACPA was not a proper person in the circumstances to bring an oppression claim.

5 The stakes were extremely significant for the defendants as the plaintiff's oppression claim puts in issue and jeopardy the entire, extensive 2004 Air Canada corporate restructuring, including follow-on public offerings. The relief requested would have unwound' the restructured enterprise and the injunctive relief sought would have prevented ACE from proceeding with an imminent court-approved special distribution to its shareholders pursuant to a Plan of Arrangement. The issues of the motion for injunctive relief were complex from a legal and factual perspective. There were some seven affidavits filed, four witnesses were cross-examined in advance of the hearing, preparation necessarily included an extensive review of complex historical documentation relating to the restructuring, the facta filed by both sides were lengthy and supplemented by large case briefs, and the hearing extended over two full days.

6 The defendants seek an award of costs in respect of the interim and interlocutory injunction motion on a substantial indemnity basis in the amount of $301,045.15 (the actual costs billed to the client reportedly being $351,766.90, inclusive of disbursements of $13,536.25) or alternatively on a partial indemnity basis in the amount of $205,208.85; and a further $55,270.00 (actual costs billed reportedly being $60,875.00) on a substantial indemnity basis in respect of the cross-motion or alternatively, $33,705.00 on a partial indemnity basis. Detailed Costs Outlines and Bills of Costs have been submitted.

7 The defendants assert that costs on a substantial indemnity scale is appropriate because ACPA had a meritless claim with allegations of misrepresentation tantamount to fraud. The defendants assert the plaintiff's proceeding was vexatious in nature because in effect it sought to revisit a matter(s) that had already been determined by a court of competent jurisdiction.

8 The plaintiff ACPA in its submissions reiterates its position that it has a massive, provable creditor claim of perhaps as much as $1 billion if Air Canada were to again become insolvent and thus, emphasizes the importance of the proceedings to ACPA.

9 The plaintiff now asserts that the defendants refused to permit (what the plaintiff calls) the threshold issue', seen in the cross-motion, as to whether the plaintiff was a proper person to be recognized as a complainant under Part XX of the *CBC,* to be determined at an earlier stage. (This asserted matter was not raised before me at the hearing but only in the plaintiff's submissions as to costs.)

10 However, the cross-motion was not simply to determine whether ACPA had capacity as a union to bring forward its claim, but also to determine whether it had standing as a creditor and whether as a creditor it had a reasonable basis for its claim of oppression. These issues were relevant to matters to be determined in respect of the motion for an injunction. I agree with the defendants' position that in all events the matters to be determined on the cross-motion could not have been readily separated from the injunction motion. Indeed, the complexity of the issues and

extensive history of the restructuring had to be considered in respect of both the main motion and the cross-motion.

11 The plaintiff says that the quantum of costs claimed by the defendants is "simply astonishing", that there is excessive legal research claimed and that the time claimed is "highly duplicative" given the number of lawyers working for the defendants on the matter. I accept the defendants' reply cost submission that given the complexity and importance of the interrelated issues it was necessary to involve a number of lawyers with different expertise and specializations and for collaborative review and opinions.

12 The plaintiff submits that costs should be fixed at $25,000.00 for each motion, inclusive of GST and all disbursements. In the alternative, the plaintiff submits that the issue of costs of both motions should be referred for assessment.

13 I disagree. A judge hearing a matter should fix costs whenever this can reasonably be done. This approach is particularly apt in the case at hand, given the tremendous complexity to the subject proceedings. There would be significant delay and further, unnecessary, costs to referring the matter of costs for assessment.

Disposition

14 In my view, and I so find, costs are properly to be on a partial indemnity scale. In my view, the two motions are sufficiently interrelated such that it is appropriate to divide the costs between them rather than allocate the costs primarily to the injunction motion. I divide the overall costs only because there may be consequences on appeal which ultimately necessitate such allocation.

15 Being mindful of the factors set forth for consideration by Rule 57.01 and that costs are to be fair and reasonable having regard to all the circumstances, I fix the costs payable by the plaintiff to the defendants in respect of each of the injunction motion and cross-motion at $ 70,000.00 for fees, plus GST of $4,200.00 and $6,768.00 for disbursements.

16 I order that the total costs of $161,936.00 is payable by the plaintiff to the defendants forthwith.

P.A. CUMMING J.

cp/e/qljxg/qljjn

TAB 2

Case Name:

Boucher v. Public Accountants Council for the Province of Ontario

Between
Sally Anne Boucher, Randolph Brown, Paul Turner and David Venn, applicants (appellants), and Public Accountants Council for the Province of Ontario, 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, Thomas A. Hards and the Institute of Chartered Accountants of Ontario, respondents (respondents in appeal)

[2004] O.J. No. 2634

71 O.R. (3d) 291

188 O.A.C. 201

48 C.P.C. (5th) 56

2004 CanLII 14579

132 A.C.W.S. (3d) 15

2004 CarswellOnt 2521

Docket No. C40044

Ontario Court of Appeal
Toronto, Ontario

Abella, Cronk and Armstrong JJ.A.

Heard: December 15, 2003.
Judgment: June 22, 2004.

(46 paras.)

Administrative law -- Judicial review -- Practice -- Costs -- Appeals -- Grounds -- Error in principle.

Application by the appellants from an order for costs against them. The appellants were Certified General Accountants. They applied for judicial review of a decision of the respondent Public Accountants Council. The appellants abandoned their application before it was heard. The respondents were awarded partial indemnity costs of $187,682.

HELD: Appeal allowed. The order was set aside. The costs order in favour of the respondents was reduced to $63,000. The judge did not err when she fixed costs rather than referred them for an assessment. There was a presumption that costs were to be fixed by the court unless the case was exceptional. An abandoned motion was not an exceptional case. The decision was entitled to a high degree of deference. However, the amount awarded for costs was not fair and reasonable, even based on the respondents' separate bills of costs. Although the bills of costs accurately reflected the time spent by all of the lawyers in this matter the total amount was not justifiable. The record was the same as in similar earlier proceedings. The respondents filed no evidence and conducted no cross-examination of any witness. The respondents received an award that was tantamount to a substantial indemnity award. This was an error in principle since the judge decided they were not entitled to costs on that scale.

Statutes, Regulations and Rules Cited:

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

Ontario Rules of Civil Procedure, Rules 37.09(3), 57.01, 57.01(3), 57.01(3.1), 58.

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

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

Appeal From:

On appeal from the order of Justice Gloria J. Epstein of the Superior Court of Justice, Divisional Court, dated November 29, 2002 awarding costs to the respondents.

Counsel:

David E. Wires, for the 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.

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 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 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' 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% 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 which provides:

> 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:

> 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:

> 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 at 245 (C.A.) 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, 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 at p. 32:

> 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., [2003] 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 Company 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% 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 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 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), 21 C.C.E.L. (3d) 161 (Ont. 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] O.J. No. 2102 (C.A.) para. 97.

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

> 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 comprised 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:

> 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:

> 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. 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.

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. et al. v. Son et al. (2003), 164 O.A.C. 195 at para. 4, this court referred to a judgment of the Superior Court in Lawyers' Professional Indemnity Company et al. v. Geto Investments Ltd. (2002), 17 C.P.C. (5th) 334, where Nordheimer J. observed at paragraph 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.

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 City of Toronto v. First Ontario Realty Corporation (2002), 59 O.R. (3d) 568 at 574 (S.C.). 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 paragraph 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.

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 paragraph 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.

ARMSTRONG J.A.
ABELLA J.A. -- I agree.
CRONK J.A. -- I agree.

TAB 3

Case Name:

Catalyst Capital Group Inc. v. Moyse

RE: The Catalyst Capital Group Inc., Plaintiff, and Brandon Moyse and West Face Capital INC., Defendants

[2015] O.J. No. 1080

2015 ONSC 1146

Court File No.: CV-14-507120

Ontario Superior Court of Justice

T.R. Lederer J.

February 20, 2015.

(5 paras.)

Counsel:

Rocco DiPucchio and Andrew Winton, for the Plaintiff.

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

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

COSTS ENDORSEMENT

1 T.R. LEDERER J.:-- 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.

T.R. LEDERER J.

TAB 4

Case Name:

Jazz Air LP v. Toronto Port Authority

Between
Jazz Air LP, Appellant, and
Toronto Port Authority, City Centre Aviation Ltd., Regco Holdings Inc., Porter Airlines Inc. and Robert J. Deluce, Respondents

[2007] O.J. No. 809

84 O.R. (3d) 641

221 O.A.C. 274

44 C.P.C. (6th) 32

155 A.C.W.S. (3d) 1038

2007 CarswellOnt 1268

Court File No. 257/06

Ontario Superior Court of Justice
Divisional Court

G.D. Lane, P.T. Matlow and G.I. Pardu JJ.

Heard: February 9, 2007.
Judgment: March 5, 2007.

(28 paras.)

Civil procedure -- Costs -- Appeals -- Solicitor and client or substantial indemnity -- Appeal by the plaintiff from an award of substantial indemnity costs dismissed -- The plaintiff's motion for an interlocutory injunction restraining termination of its commercial lease was dismissed -- The judge found that the motion was without merit and awarded costs of $160,000 -- The appellate court ruled that the judge was open to make such an award due to the importance of the issues, the unsubstantiated allegations, and the late timing of the plaintiff's motion -- The judge did not err in principle, nor was he plainly wrong.

Statutes, Regulations and Rules Cited:

Competition Act,

Rules of Civil Procedure,

Counsel:

Donald H. Jack and Brian N. Radnoff, for the Appellant.

Robert L. Armstrong and Orestes Pasparakis, for the Respondents.

Reasons for judgment were delivered by G.I. Pardu J., concurred in by G.D. Lane J. Separate dissenting reasons were delivered by P.T. Matlow J.

1 **G.I. PARDU J.**:-- Jazz Air appeals from a substantial indemnity costs award made against it by Spence J. in the sum of $160,000 following dismissal of Jazz's motion for an interlocutory injunction. Jazz argues that Spence J. erred:

(1) In awarding substantial indemnity costs in the absence of any finding of reprehensible, scandalous or outrageous behaviour in the conduct of the litigation, and that his decision provided no basis to award substantial indemnity costs;
(2) In awarding costs in an amount that was excessive and unreasonable for a one-day motion;
(3) In allowing costs to be calculated at a minimum increment of .25 hours rather than .1 hours.

2 This one day motion was no simple matter. On January 31, 2006, one of the defendants terminated the monthly tenancy for premises occupied by Jazz on Toronto Island, effective February 28, 2006. Porter Airlines planned to begin passenger flight operations there and had purchased $500 million dollars worth of new aircraft. It had a tight construction schedule for renovations set to start March 1, 2006. Grant of the injunction restraining termination of the lease for the premises occupied by Jazz would have had catastrophic consequences for Porter Airlines. Jazz did not serve its notice of motion and some of the supporting material until 6:21 p.m. on February 23, 2006. Porter Airlines had heard rumours of the pending motion several days earlier and had begun to prepare for the motion.

3 Justice Spence reviewed the voluminous materials prepared by the parties over the weekend and heard argument from a flock of senior counsel on Monday, February 27th.

4 In an endorsement released the same day, Spence J. concluded:

(1) Jazz LP was not a party to the lease, which in any event was likely terminable on one month notice which was given.
(2) A breach of the *Competition Act* was unlikely.

(3) The termination of the lease was likely in accordance with the terms of the lease.
(4) The defendants had good business reasons to use the leased premises and their conduct would not likely amount to conspiracy.
(5) The claims alleging restraint of trade and intentional interference with economic relations were similarly ill-founded.

5 On May 24, 2006, Spence J. released his costs endorsement:

> The request of the Porter defendants for costs on the substantial indemnity scale and on the order of the large amount they request is supported by their submissions. There is no reason to defer fixing the costs or to send them to assessment. The only reasonable expectation the plaintiff could have had is that Porter would do everything it could to prepare for and present a case with the best possible prospect of succeeding. Without the bill that the plaintiff's counsel are submitting to the plaintiff for this matter, the comment that an attack of the kind they have made on quantum is "no more than an attack in the air" seems quite apt and no doubt could be put more bluntly.
>
> I doubt that the top of the rate is appropriate for all of the lawyers for all of their work, so I would reduce the amount for fees to $160,000 before GST, with disbursements as in the bill of costs plus applicable GST. Costs are to be fixed on the above basis and to be payable in 30 days.

6 The fees claimed by the defendants totalled $176,321.25, but were reduced to $160,000 by Spence J.

7 A judge's decision on costs is entitled to a high degree of deference. As observed by Arbour J.:

> "A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the award is plainly wrong."[1]

8 On occasion, reasons must be brief because of the pressure of time. Although not ideal, reasons which incorporate by reference a portion of a party's written submissions are adequate provided that the parties understand the reasons for the decision[2].

9 Here the reasons met that test. Spence J. adopted the submissions of the defendants on the issues of whether costs should be awarded on a substantial indemnity basis and in the range of the massive amount claimed.

10 It was open to Spence J. to award costs on a substantial indemnity basis because of the unsubstantiated allegations of conspiracy and improper conduct[3] and because of the tactical approach to the timing of the motion.

11 As Farley J. noted in *Controlled Media Investments Inc. v. Penfund Capital (No. 1) Ltd.*, [2000] O.J. No. 614:

> ... that scale of costs (which I would think amply supported by the work involved on a hurry up urgent basis created by Dale) would make other litigants think twice before engaging in such inappropriate tactical skirmishes. If that scale does

> not have that salutary result, then that scale should be adjusted in any future case under similar circumstances.

12 Spence J. concluded that the motion for the injunction was entirely without merit.

13 As observed by Mesbur J.[4]:

> An injunction is an extraordinary remedy. Parties who seek injunctions should keep in mind, and remember that they do so at their peril, if they fail. Injunctions should not be undertaken lightly. There is good reason for the moving party to be required to make an undertaking as to the damages. **Where the injunction is without merit, the responding parties are entitled to be compensated for its losses. I see an abandoned injunction in this light. Here, damning allegations were made against defendants. They were put to considerable expenses and inconvenience to respond to them, on an urgent basis. ... I see no reason for the defendants not to receive their solicitor and clients costs, forthwith.**

14 A lost but hard fought battle alone does not justify costs on a substantial indemnity basis, although the stakes are high.

15 The appellants argue that the $160,000 awarded for costs was grossly in excess of any fair and reasonable expectation of the parties, and that an amount in the $40,000 range would have been more appropriate.

16 In *Boucher et al v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), Armstrong J.A. for the court said at paras. 37 and 38:

> **[37]** The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objectives 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 ...

17 Given the tight timetable and the importance of the issues, it was reasonable for Spence J. to conclude "the only reasonable expectation the plaintiff could have had is that Porter would do everything it could to prepare for and present a case with the best possible prospect of succeeding."

18 The plaintiff refused to disclose its own dockets for the motion. It is reasonable to conclude that the plaintiff spent as much or more lawyers' time on the motion. The defendants did not have the luxury of developing a finely calibrated litigation strategy. They had to go flat out with all available resources. Spence J. was entitled to consider this as a factor[5].

19 Moreover, Spence J. did not simply take a mechanical approach of multiplying hours spent and an hourly rate, but moderated the hourly rates claimed. The defendant's actual costs of responding to the motion were approximately $280,000. The calculation of time in quarter-hour intervals was insignificant in this case because of the compressed time period over which the work was carried out.

20 The comments at paragraph 55 in *Andersen v. St. Jude Medical, Inc.* (2006), 264 D.L.R. (4th) 557 (Ont. Div. Ct.) are equally apt here:

> **[55]** A final submission advanced by the defendants is that an award of this magnitude will have a chilling effect on class proceedings. We do not find this submission compelling in circumstances where the defendants, at least initially, drove the plaintiffs into a game of high stakes poker, sparing no expense in marshalling evidence and then declined to put their own costs before the court. Having lost a very expensive and important motion, it is disingenuous for the defendants to now claim that the costs award is outside the range of what they reasonably expected. If the plaintiffs had lost the motion, it similarly would not lie in their mouths to make this submission.

21 Although the costs awarded are enormous, Spence J. did not err in principle, nor was he plainly wrong to award the costs he did. Accordingly, the appeal is dismissed. If necessary, the parties may make written submissions as to the costs of this appeal, due from the defendants within 20 days after release of this decision, and from the plaintiff, within 10 days thereafter.

G.I. PARDU J.
G.D. LANE J.:-- I agree.

22 P.T. MATLOW J. (dissenting):-- With respect, I am unable to agree with the disposition of the majority with respect to the quantum of costs awarded by the motion judge. I would allow the appeal and vary paragraph 1 of the order in appeal to provide that the award of costs be fixed in the sum of $80,000 for fees plus the additional amounts specified in that paragraph. This sum is the highest that I would consider to be fair and reasonable in the circumstances. I would also invite counsel to make submissions regarding costs in the manner set out in the reasons of Pardu J. on behalf of the majority.

23 The Rules of Civil Procedure now provide relatively few guidelines for judges to apply in the fixing of costs. Judges are generally left to apply a very broad discretion, especially with respect to quantum, based on the costs outlines which must now be filed by counsel. There are hardly any safeguards or restrictions still in place to prevent the making of costs awards that are excessive and there is no real evidence presented upon which most costs awards are based. In the case at bar, the motion judge was left to make his award on the basis of what he learned during his consideration of the motion before him and the bill of costs (not "costs outline") and submissions filed.

24 The amount that the motion judge awarded solely for fees, namely, $160,000 was a very large sum by any standard. Observers might well be forgiven for considering it odd that such a large sum could be awarded almost summarily and without formal evidence of any kind whereas judgments for even very small amounts of money can generally be granted only after evidence is considered by the court, usually after a trial or some other hearing. The process we now follow might even be seen by those observers to reflect a triumph of expedience over justice when it comes to costs.

25 This is one of several important reasons why judges must now take into account, in fixing costs, what they consider to be the reasonable expectations of the parties. Those expectations are an important factor in the determination of what is fair and reasonable, the amount which should ideally constitute both the upper and the lower limit of what should be awarded. An amount that exceeds those expectations should be awarded only sparingly and only if it is clearly justified by the circumstances. If there were ever to be a trend showing that awards of costs have risen far above such expectations, litigants would likely lose confidence in the administration of justice and would be unwilling take the risks inherent in litigating in our courts.

26 I am persuaded that the motion judge failed to give sufficient weight to reasonable expectations and that he failed to fix costs in a sum that was both fair and reasonable. The sum that he awarded far exceeded what I would regard as the upper limit for such an award even on the substantial indemnity level. Although it is not impossible, it is difficult in my view to conceive of any one-day motion, including the various associated steps also required to be taken, that could ever justify an award of costs for fees at the level of the award made. Regardless of the demonstrated very high importance of the motion to the responding parties and the extremely large amount of time that their counsel and others working with them decided to devote to it, in my view the sum awarded was unreasonable and reflected an error in principle. Despite the deference that the award of the motion judge deserves, I am persuaded that it should now be reduced.

27 Such an approach was followed by the Court of Appeal in cases such as *Moon v. Sher* 246 DLR (4th) 440 and *Boucher v. Public Accountants Council for the Province of Ontario*, 71 O.R. (3d) 291. Those cases dealt with awards of costs that were made while the grids were in force and apply even more aptly now that the grids have been eliminated. In both cases the Court recognized that, in fixing costs, reasonableness was the overriding principle.

28 It is also my view that the motion judge further erred in principle in taking into account the failure of counsel for the appellant to disclose his bill rendered to his own client. There is no logical reason why the appropriate quantum of the respondents' costs should be related in any way to that bill or the underlying dockets.

P.T. MATLOW J.

1 *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, (2003) 2004 SCC 9 at paragraph 27

2 *2878852 Canada Inc. v. Jones Heward Investments Counsel Inc and Marshall Nicholishen*, [2007] O.J. No. 78, 2007 ONCA 14 at para 28

3 *Apotex v. Egis Pharmaceuticals* (1990) 2 O.R. (3d) 126 (Gen. Div.)

Hunt v. TD Securities Inc. (2003) 66 O.R. (3d) 481 (C.A.)

4 *Henry Schein Arcona Inc. v. Mullin*, [2000] O.J. No. 3733 (S.C.J.) at paras. 2, 3 & 6 (emphasis added)

5 *Andersen v. St. Jude Medical, Inc.* (2006), 264 D.L.R. (4th) 557 at 567

TAB 5

Case Name:

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

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

[2008] O.J. No. 374

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

Court File No. 07-CV-342938 PD3

Ontario Superior Court of Justice

B.A. Conway J.

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

(36 paras.)

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

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

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

Statutes, Regulations and Rules Cited:

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

Counsel:

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

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

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

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

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

ENDORSEMENT ON COSTS

B.A. CONWAY J.:--

Introduction

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

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

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

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

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

Payment of Costs on a Contested Motion

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

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

> Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith ... On the other hand, it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the questions of costs to the trial judge.

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

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

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

Scale of Costs

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

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

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

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

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

15 I will award costs on a partial indemnity scale.

Quantum of Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Decision

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

B.A. CONWAY J.

cp/e/qlkxl/qlpwb/qlcas

TAB 6

Indexed as:

Omega Digital Data Inc. v. Airos Technology Inc.

Between
Omega Digital Data Inc., and
Airos Technology Inc. et al.

[1997] O.J. No. 6288

32 O.R. (3d) 23

29 C.C.E.L. (3d) 249

Ontario Court of Justice (General Division)

Sharpe J.

April 18, 1997.

(10 paras.)

Practice -- Costs -- Costs of interlocutory proceedings -- Payment forthwith.

Application by the plaintiff Omega Digital Data for costs of a motion for the continuation of an interlocutory injunction on a solicitor and client basis in the sum of $400,448 and disbursements of $426,117. The defendants, Airos Technology and others, submitted that the variation made to the terms of the injunction were so significant that they were the successful parties and asked for costs on a party and party basis in the sum of $150,000 plus disbursements of $14,979.

HELD: Application allowed in part. The legal fees portion of the party and party costs of the motion was fixed at $200,000, without prejudice to the right of the parties to seek costs on a higher scale from the trial judge. It was ordered that the matter of entitlement to those costs be left to the discretion of the trial judge but that the defendants pay into Court $200,000 forthwith to remain in court pending any further order or final resolution of the action. Omega was successful on the motion. They secured substantial protection of their position pending the trial. There were unusual circumstances. It appeared that this litigation was being financed and, to a significant degree, maintained by an offshore company, that Airos had no other financing and that Omega could have difficulty in enforcing a costs order if successful at the end of the day. An award of costs on a solicitor-client scale was premature. Airos and the others were entitled to a trial on their serious allegations against Omega.

Statutes, Regulations and Rules Cited:

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

Ontario Rules of Civil Procedure, Rule 1.05.

[Quicklaw note: Original reasons for judgment were released December 23, 1996. See [1996] O.J. No. 5382.]

Counsel:

F. Paul Morrison, Andrew J. Reddon and Marguerite F. Ethier, for the plaintiff.
K. William McKenzie and Sheri L. Tornosky, for defendants.

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1 **SHARPE J.**:-- On December 23, 1996 I gave oral reasons continuing to trial as an interlocutory injunction an interim injunction which had been granted earlier in this proceeding, subject to certain changes which narrow the scope of the injunction. The parties have now made submissions with respect to the costs of the motion for an interlocutory injunction. The plaintiff asks me to award costs on a solicitor and client basis in their favour in the amount of $400,447.50 and disbursements of $426,117.19, for a total of $826,564.69. The defendants submit that the variations I made to the terms of injunction were so significant that they were the successful party and ask me to award them costs on a party and party basis in the amount of $150,000 plus disbursements of $14,979.21.

2 In my view there can be no doubt but that the plaintiffs were, in substance, successful on the motion for an interlocutory injunction. While I did narrow the terms of the injunction and while this may well alleviate the burden of the injunction on the defendants to some degree, it cannot be denied that the plaintiffs secured substantial protection of their position pending trial in this matter.

3 I adopt as useful statements of the principles to be applied in determining costs of a successful motion for an interlocutory injunction the judgments of Lederman J. in Ontario (Attorney General) v. Ballard Estate, [1995] O.J. No. 3885 (Gen. Div.), and of Borins J. in Rogers Cable TV Ltd. v. 373041 Ontario Ltd., [1994] O.J. No. 1087 (Gen. Div.). In this case, as in those cases, there was no final determination as to the rights of the parties, but rather the award of an interlocutory injunction to protect the position of the plaintiff pending trial. While I found that the plaintiff was deserving of an interlocutory injunction in accordance with the principles established by the Supreme Court of Canada in RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, such a finding falls well short of any final determination in favour of the plaintiff. I agree with Borins J. in Rogers Cable TV that the situation is distinguishable from that contemplated by Axton v. Kent (1991), 2 O.R. (3d) 797 at p. 800, where the Divisional Court indicated that ordinarily costs of interlocutory matters should be fixed and made payable forthwith. Accordingly, I decline to award costs against the defendants or to require that the defendants pay the costs to the plaintiff forthwith as such orders should await the trial.

4 I do, however, have a discretion to exercise in formulating an appropriate order. I accept the submission of the plaintiffs that there is an unusual circumstance in the case at bar which should be

taken into account in the exercise of the discretion I have to formulate an appropriate costs order with respect to the interlocutory injunction motion. On his cross-examination, one of the defendants and principals of Airos, Matthew Moore, admitted that an Australian company, Intellect, is paying the defendants' operating expenses, financing the defendants' legal bills and that the defendants have no other financing for their operations. Moreover, there is evidence that pursuant to a memorandum of understanding between Intellect and Airos, Intellect is to become a majority partner with 51 per cent ownership of the defendant Airos.

5 This is clearly hard-fought and expensive litigation. On the evidence before me it would appear that this litigation is being financed and, to a significant extent, maintained on behalf of an offshore company, that the defendant Airos has no other financing and that the plaintiff Omega may well have difficulty in enforcing a costs order if successful at the end of the day.

6 The discretion with respect to costs conferred by s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, is broad. Rule 1.05 of the Rules of Civil Procedure provides that the court "may impose such terms and give such directions as are just" when making an order under these Rules. Both parties invite me to fix the costs of the interlocutory injunction proceedings. While the rules of court do not specifically provide for an order for security for costs against a defendant, this is not a simple application for security for costs but rather a request by a successful party on an interlocutory motion that an appropriate costs order be made. In my view, the appropriate order is that I fix the party and party costs of the interlocutory injunction motion and require that the defendants pay that amount into court, reserving to the trial judge the decision as to who should bear the costs of the interlocutory injunction proceedings.

7 While the plaintiffs have asked that costs be fixed on a solicitor-client scale, in my view such an order would be premature. The defendants have made and maintain serious allegations against the plaintiffs and they are entitled to a trial on those allegations. Accordingly, I propose to fix the costs on a party and party basis, without prejudice to the right of either party to seek costs on a higher scale in light of the eventual outcome of this action.

8 In fixing the costs, I limit myself to the legal fees as a figure can be arrived at which would be appropriate to both parties. There remain issues to be determined with respect to disbursements. The disbursements of the respective parties are not the same and determination and entitlement to recover disbursements should await the final result. Moreover, disbursements claimed by the plaintiff, namely, the fees of Smart and Biggar, the law firm retained to supervise the Anton Piller order and the account of Linquist, Avey may require closer scrutiny than is practicable at this stage. Particularly with respect to the Linquist, Avey accounts, I do not have before me sufficient detail to properly assess the reasonableness of the charges claimed by the plaintiffs. With respect to the Smart and Biggar account there is an issue raised by the defendants as to whether the plaintiffs should be able to claim those fees as against the defendants in any event in light of certain terms of the Anton Piller order. These issues, in my view, are best left to the trial judge for determination.

9 With respect to legal fees, the plaintiffs submit that an appropriate party and party award would be $200,000. The defendants submit that a more appropriate amount would be $150,000. While both amounts are very large for an interlocutory proceedings it is clear that an enormous amount of effort was poured into the injunction application. Extensive affidavit material was filed. There were as well extensive examinations and considerable legal research. I find that the appropriate amount for party and party costs for these proceedings is $200,000. By "these proceedings" I refer specifically to the attendances and preparation listed in pp. 1, 2 and 3 of Sch. "A" to the written

argument of the plaintiff, a copy of which I attach to this endorsement. I make no order with respect to any other proceedings which are subject to any costs orders made by the judges hearing those proceedings and to the ultimate discretion of the trial judge in this matter.

10 For the foregoing reasons it is my order that the legal fees portion of the party and party costs of the above-noted proceedings in relation to the interlocutory injunction be fixed at $200,000, that such determination is without prejudice to the right of the parties to seek costs on a higher scale from the trial judge, that the matter of entitlement to those costs be left to the discretion of the trial judge in this matter, but that the defendants be required to pay into court $200,000 forthwith remain in court pending any further order of this court or final resolution of this action.

* * * * *

SCHEDULE "A"

SUMMARY OF OMEGA COSTS

COURT APPEARANCES (PREPARATION (FOR AND ATTENDANCES AT)	TIME
October 11, 1996 (MacFarland J.) Airos' motion for Order dissolving injunction adjourned to the return of the motion for interlocutory injunction. Ancillary order requiring production of data tapes by Smart & Biggar	TGH 2.5 x $425 = $1,062.50 FPM 15.7 x $400 = $6,280.00 EG .3 x $390 = $117.00 AJR 29.3 x $240 = $7,032.00 ME 27 x $215 = $5,805.00 GH .1 x $200 = $20.00 IN 7.5 x $160 = $1,200.00 Student 9.8 x $80 = $784.00
	Total $22,620.50
October 18, 1996 (Lane J.) Date set for interlocutory injunction motion, and the defendant's motion to dissolve. Adjourned at request of defendants. Interim injunction continued.	FPM 16.5 x $400 = $6,600.00 BBS 3 x $330 = $990.00 AJR 44.9 x $240 = $10,776.00 AJR 45.3 x $240 = $10,872.00 ME 35.1 x $215 = $7,546.50 IN 9.4 x $160 = $1,504.00 Student 46.5 x $80 = $3,720.00
Total	$42,008.50

October 30, 1996 (Spence J.) Defendant's motion for various relief dismissed in part, granted in part, with the majority of the motion	FPM 11 x $400 = AJR 7.5 x $240 = ME 9.4 x $215 =	$4,400.00 $1,800.00 $2,021.00

Total $8,221.00
adjourned to November 8, 1996

November 8, 1996 (Spence J.)
Protective order finalized. Remainder of motions adjourned to November 8 remain unadjudicated.

FPM 16 x $400 = $6,400.00 AJR 22.5 x $240 = $5,400.00 ME 35 x $215 = $7,525.00 IN 37.5 x $160 = $6,000.00 Student 10.1 x $80 = $808.00 PS .5 x $35 = $17.50

Total $26,150.50

December 18 and 19, 1996
(Sharpe J.)
Omega's motion for
interlocutory
injunction granted.
Defendants' motion to dissolve
the injunction dismissed.

TGH 10 x $425 = $4,250.00
FPM 58.7 x $400 = $23,480.00
EG .5 x $390 = $195.00
AJR 92.3 x $240 = $22,152.00
ME 105.9 x $215 = $22,768.50
IP 1 x $160 = $160.00
IN 54.8 x $160 = $8,768.00
Pat. Agent .3
x $100 = $30.00
Student 6.8 x $80 = $544.00
Clerk 62.7 x $75 = $4,702.50
Ass. Lib .3 x $75 = $22.50

Total $87,072.50

Supervision of Anton Piller Order as required by Lissaman J. (September 29, 30, 31 etc.) and follow up.

TGH 8.9 x $425 = $3,782.50 EPK 42.2 x $375 = $15,825.00 BBS 5.7 x $330 = $1,881.00 AJR 19 x $240 = $4,560.00 ME 26.8 x $215 = $5,762.00 GH 6.6 x $200 =

		$1,320.00 SF 1.7 x $180 = $306.00 IP 46.5 x $160 = $7,440.00 MS 23.4 x $160 = $3,744.00 IN 102.9 x $160 = $16,464.00 TW 34.3 x $140 = $4,802.00 WT 20.4 x $140 = $2,856.00 Student 8.4 x $80 = $672.00
Total	$69,414.50	
Review of Documents Obtained Under Anton Piller Order and Follow Up.		FPM .8 x $400 = $320.00 PK 4.9 x $375 = $1,837.50 AJR 14.3 x $240 = $3,432.00 ME 11.6 x $215 = $2,494.00 IP 1 x $160 = $160.00 IN 19.6 x $160 = $3,136.00 Student 5.6 x $80 = $448.00
Total	$11,827.50	

Preparation of Statement of Claim.	TGH 5 x $425 =	$2,125.00
	EPK 3.5 x $375 =	$1,312.50
	BBS 10.8 x $330 =	$3,564.00
	AJR 6 x $240 =	$1,440.00
	IP 16 x $160 =	$2,560.00
	PS .5 x $35 =	$17.50
Total	$11,019.00	

Preparation of Affidavits	TGH 14.5 x $425 = $6,162.50 FPM 7.5 x $400 = $3,000.00
Wayne Blackburn, sworn Sept. 27, 1996 Andrej Zdravkovic, sworn Sept. 27, Oct. 2, Oct. 10, Nov. 5 & Nov. 12, 1996 Michael Coveley, sworn Sept. 27, Sept. 30, Oct. 10 & Nov. 26, 1996 Philip Fleishman, sworn Oct. 2, 1996	EPK 11.7 x $375 = $4,387.50 BBS 14 x $330 = $4,620.00 AJR 70.8 x $240 = $16,992.00 SJ .2 x $230 = $46.00 ME 24.7 x $215 = $5,310.50 IP 66.1 x $160 = $10,576.00 IN 17.7 x $160 = $2,832.00 TW 2.5 x $140 = $350.00 Student 10.2 x $80 = $816.00 JD .8 x $65 = $52.00

Total $55,144.50

Kevin Kim, sworn Oct. 2, 1996
Philip Fleishman, sworn Oct. 2, 1996
Drazen Ivanovic, sworn Oct. 2, 1996
John K. Downing, sworn Oct. 10, 1996
Craig Shepherd, sworn Oct. 10, 1996
Leo Vandergroef, sworn Oct. 10, 1996
Dr. Gordon Agnew, sworn Oct. 17, Nov. 24 & Dec. 2, 1996
Simon Johnson, sworn Oct. 16, 1996
Hugh Turnbull, sworn Oct. 17, 1996
Angela Pang, sworn Nov. 6, 1996
Andrew MacDougall, sworn Nov. 8, 1996
Michael Rinaldo, sworn Nov. 20, 1996
Vojin Zivojinovic, sworn Nov. 22 & Dec. 22, 1996
Vladimir Urosevic, sworn Nov. 24, 1996
Joshua Kirshenbaum, sworn Oct. 2, 1996
Mohamed Elmasry, sworn Nov. 24, 1996 (2 affidavits)

Cross-Examinations Preparation for, attendance at and follow up with.

FPM 77.5 x $400 = $31,000.00 AJR 99.2 x $240 = $23,808.00 ME 44.1 x $215 = $9,481.50 IN 16.5 x $160 = $2,640.00 Student .5 x $80 = $40.00

Total $66,969.50

Dr. Gordon Agnew, held Dec. 5, 1996
Michael Coveley, held Dec. 2 & 3, 1996
Mohamed Elmasry, held Dec. 5, 1996
Andrej Zdravkovic, held Oct. 17 & Nov. 7, 1996
Dragoslav Jovanovic, held Dec. 4, 1996
Ronald Kroll, held Nov. 7 and Dec. 6, 1996
Marek Pach, held Dec. 4, 1996
Nebojsa Djurdevic, held Oct. 15, Nov. 7, Dec. 4 & 6, 1996
Matthew John Moore, held Oct. 16, Dec. 5 & 6, 1996

qp/s/np/qlmjb

TAB 7

THE
LAW OF COSTS

SECOND EDITION

VOLUME II

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OF THE ONTARIO BAR

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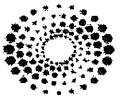

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§408. Costs of Particular Motions — *Continued*

Central to the issue of the costs of a motion for an interlocutory injunction is the principle that an injunction is an extraordinary equitable remedy that ought to be sought with caution and granted sparingly.[234] Thus, a motion for an injunction was dismissed with costs on a solicitor-and-client scale where the claim was without merit, the grounds for the motion were tenuous, and the plaintiff had alleged fraud and deceit;[235] and also where plaintiff's motive for seeking an interim injunction was improper and the claim upon which it was obtained lacked legal merit,[236] but costs may also be awarded on a lesser scale, depending on the circumstances.[237] When the application is successful, it

233.1 *Cana International Distributing Inc. v. Standard Innovation Corp.* (2011), 198 A.C.W.S. (3d) 27 (Ont. S.C.J.).

234 *Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R. (3d) 126, 32 C.P.R. (3d) 559 (Gen. Div.). For the costs of an abandoned injunction motion see heading "Abandoned Motions", *supra*, para. 403.

235 *Ibid.* See also *Lawson v. Toronto Hospital Corp.* (1991), 52 O.A.C. 186 (Div. Ct.) (respondents entitled to solicitor-and- client costs where unsuccessful applicant for interim injunction made very serious allegations of wrongdoing).

236 *Canadian Coal Co. v. B.P. Resources Canada Ltd.* (1991), 54 B.C.L.R. (2d) 12 (S.C.); *Ontario (Minister of the Environment) v. National Hard Chrome Plating Co.* (1993), 39 A.C.W.S. (3d) 79 (Ont. Ct. (Gen. Div.)) (costs of unnecessary motion for mandatory injunction fixed at $45,000); *Coran v. Doyle* (1992), 34 A.C.W.S. (3d) 1202 (Ont. Ct. (Gen. Div.)) (costs of aborted injunction motion awarded on solicitor-and-client basis); *Applied System Technologies Inc. v. Sysnet Computer Systems Inc.* (1992), 41 C.P.R. (3d) 129 (Ont. Ct. (Gen. Div.)) (party-and-party costs of unsuccessful injunction motion fixed at $80,000); *Canadian Waste Services Inc. v. North Bay (City)* (2001), 21 M.P.L.R. (3d) 38 (Ont. S.C.J.) (costs of one-day motion where proceedings moderately complex fixed at $10,000); *C-Mac Invotronics Inc. v. Intier Automotive Closures Inc.* (2005), 143 A.C.W.S. (3d) 801 (Ont.S.C.J.) (partial indemnity costs of 1-day motion fixed at $30,000); *Fort William Indian Band v. Thunder Bay (City)* (2005), 21 M.P.L.R. (4th) 51 (Ont. S.C.J.) (costs of unsuccessful motion fixed at $10,000).

237 *Johnson & Johnson Inc. v. Bristol-Myers Squibb Canada Inc.* (1996), 66 C.P.R. (3d) 26 (Ont. Ct. (Gen. Div.)) (on unsuccessful motion for interim injunction defendant's costs allowed at 66% of defendant's solicitor-and-client bill plus provable disbursements); *Dragon Systems Inc. v. Kolvox Communications Inc.* (1996), 64 C.P.R. (3d) 506 (Ont.Ct. (Gen.Div.)) (defendants awarded solicitor-and-client costs for work and expenditures necessitated solely by unsuccessful motion for interim injunction, but not costs necessary in any event to advance the litigation); *Homes for Sale Magazine Ltd. v. Auto Mart Magazines Ltd.* (1997), 72 A.C.W.S. (3d) 1168 (Ont. Ct. (Gen. Div.)) (successful respondent in injunction application who made offer to settle by dismissal of motion not entitled to solicitor-and-client costs, being in same position as defendant under rule 49.10(2)); *Sar Group Inc. v. Orbis International, Inc.* (1998), 79 A.C.W.S. (3d) 469 (Ont. Ct. (Gen. Div.)) (application dismissed, merits of plaintiff's case problematical, costs fixed on party-and-party scale); *Family Delicatessen Ltd. v. London (City)* (1998), 84 A.C.W.S. (3d) 37 (Ont. Ct. (Gen. Div.)) (application dismissed, issues not novel or of public interest, costs fixed on party-and-party scale); *Gas Tops Ltd. v. Forsyth* (1998), 42 O.R. (3d) 637 (Gen. Div.) (costs of abandoned motion fixed on liberal party-and-party scale); *Norigen Communications Inc. v. Ontario Hydro Energy Inc.* (2000), 100 A.C.W.S. (3d) 203 (Ont. S.C.J.) (elements not sufficiently compelling

TAB 8

Case Name:

Verge Insurance Brokers Ltd. v. Sherk

Between
Verge Insurance Brokers Limited, 172968 Ontario Inc., Marick Bros. Investments Inc. and Mark Sherk, Plaintiffs, and Richard Sherk, Daniel Sherk, Martin, Merry & Reid Limited and Cal Shultz Insurance Brokers Ltd., Defendants

[2013] O.J. No. 5889

2013 ONSC 7855

St. Catharines Court File No. 53982/12

Ontario Superior Court of Justice

J.W. Quinn J.

December 20, 2013.

(264 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Considerations -- Particular orders -- Party and party or partial indemnity -- Particular circumstances -- Interlocutory proceedings -- Where success divided -- Determination of costs -- Plaintiffs were awarded $255,237 in costs -- Plaintiffs alleged that two individual defendants took confidential information to corporate defendant, which competed with corporate plaintiff in field of commercial insurance -- Plaintiffs were entitled to costs of injunction motion on partial indemnity scale -- Plaintiffs "won" injunction motion and that part of action was spent -- There were no costs of production motion -- It was "draw" for all parties -- Each defendant was responsible for third of costs.

Determination of costs. The plaintiffs alleged that the two individual defendants took confidential information to the corporate defendant, which competed with the corporate plaintiff in the field of commercial insurance. The plaintiffs moved for an injunction and production of documents. The injunction motion was settled without argument and the production motion was stayed on consent. The defendants had denied wrongdoing, but some allegations turned out to be true.

HELD: The plaintiffs were awarded $255,237 in costs. The plaintiffs were entitled to their costs of the injunction motion on a partial indemnity scale. The plaintiffs "won" the injunction motion and that part of the action was spent. One of the individual defendants had surrendered his licence to sell insurance and the other had resigned from the corporate defendant. As a result, the common argument in favour of deferring until trial the determination of costs in an injunction motion was eliminated. There were no costs of the production motion. It was a "draw" for all parties. Some of the costs claimed for the injunction motion were not allowed, including amounts associated with the statement of claim, a response to a demand for particulars and a summons that the plaintiffs did not proceed with. Each defendant was responsible for a third of the costs. All three participated in a corporate mÚnage Ó trois and their respective liability for costs could not be distinguished in any meaningful way.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131, s. 131(1)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 15.02, Rule 34.04(4), Rule 34.10, Rule 34.10(2)(b), Rule 34.10(3)(a), Rule 34.10(4), Rule 34.12, Rule 34.14, Rule 34.14(1)(d), Rule 34.15, Rule 34.15(1), Rule 34.15(1)(a), Rule 34.15(1)(b), Rule 34.15(1)(c), Rule 34.15(1)(d), Rule 37.10, Rule 57.01(1), Rule 57.01(1)(0.a), Rule 57.01(1)(0.b), Rule 57.01(1)(a), Rule 57.01(1)(b), Rule 57.01(1)(c), Rule 57.01(1)(d), Rule 57.01(1) (e), Rule 57.01(1)(f), Rule 57.01(1)(i), Rule 57.01(3), Rule 57.01(4), Rule 57.03(1)

Counsel:

Stephen F. Gleave and Richelle M. Pollard, for the plaintiffs/moving parties.

John M. Wigle, for the defendant/responding party, Richard Sherk.

George Limberis, for the defendant/responding party, Daniel Sherk.

Gerard Barosan, for the defendant/responding party, Cal Schulz Insurance Brokers Ltd.

J.W. QUINN J.:--

I INTRODUCTION

1 An internecine war has erupted in a 60-year-old, family-owned, insurance agency in southern Ontario. It is alleged that a co-owner of the agency (and brother of the other co-owner) and his son, a recently-fired employee, armed with confidential information, intended to transform another agency into a competitor in the field of commercial insurance.

2 Two motions were brought by the plaintiffs. One sought production of documents ("production motion") from three defendants and their re-attendance for cross-examination and the other asked for injunctive relief as against those same defendants.

3 The production motion was heard first. It consumed one week of court time and subsequently was stayed on consent. The injunction motion was settled and never argued.

4 The motions were ferociously prosecuted and vigorously defended.[1] I must now determine the matter of costs.

5 The principal issues are these: (1) Should costs be fixed and payable forthwith or, as often occurs in injunction motions, reserved to the trial judge? (2) What is the appropriate scale of costs? (3) Should the three responding parties to the motions be jointly and severally liable for the costs?

6 The plaintiffs seek substantial-indemnity costs of $392,091.21. This scale of costs is said to be appropriate largely because the defendants denied any wrongdoing in the face of documents that clearly revealed otherwise and, the defendants, by their conduct, lengthened the proceedings.

7 The written costs arguments of counsel have been made with fastidious attention to detail. There are 15 sets of written submissions (in recognition of the milky way of points raised by counsel, I permitted submissions by way of reply, rebuttal, surrebuttal and beyond). I do not have the requisite life-expectancy to address all of the points in these Reasons. The parties will have to take my word that if an argument is not mentioned by me it may be assumed that it was considered and rejected as irrelevant to the issue of costs. Nevertheless, because of the comprehensiveness of the written arguments, I feel compelled to be more detailed in my Reasons than otherwise would be necessary. A great deal of money is at stake.

8 There is much about this case that resembles a Family Court proceeding involving an adulterous spouse: passion has pilfered all perspective; judgment that would otherwise be insightful is clouded; bitterness hangs in the air; and, the IQs of the parties have temporarily dropped to the ambient temperature of the courtroom (otherwise, why would this family be exposing its dirty corporate laundry in such a public forum).

9 The parties are discovering that revenge has an odour - it is the smell of burning money.[2]

II BACKGROUND

1. The parties to the motions

(a) *the moving parties*

10 The plaintiff, Verge Insurance Brokers Limited ("Verge"), is a company that carries on business as an insurance broker. The head office of Verge is located in the City of St. Catharines. Verge and its related and subsidiary companies constitute the largest general insurance brokerage in the Niagara Peninsula.

11 The plaintiff, Mark Sherk ("Mark"), is the president and managing director of Verge. He owns 50% of its shares.

12 Although the other two corporate plaintiffs are moving parties, their role is such that I need not mention them further.

(b) *the responding parties*

13 The defendant, Richard Sherk ("Richard"), is the brother of Mark. He is an officer and director of Verge and he owns the other 50% of the shares.

14 The defendant, Daniel Sherk ("Daniel"), is a former salesperson at Verge and the son of Richard.

15 The defendant, Cal Schultz Insurance Brokers Ltd. ("CSI"), is a company that carries on business as an insurance broker in the City of Burlington. It is alleged that CSI is the competitor who knowingly benefited from the wrongdoing of Richard and Daniel.

16 The remaining corporate defendant is not involved in the motions.

2. The genesis of the action

17 On April 3, 2012, Richard, having reached the age of 65 years, retired from Verge. On April 26th, Daniel, a 13-year employee, was fired (effective May 2nd) on the grounds of incompetence, insubordination and sexual harassment. I am not aware that the retirement of Richard was controversial (it being age-related), however, Daniel disputes the grounds for his firing.

18 The timing of these two events (the retirement and the firing) is curious and permits some obvious theorizing. I expect that Sherk family gatherings were sparsely attended well before April of 2012. It is conjecture to conclude, but highly probable, that serious problems permeated Verge before that date. In any event, it is easy to see how Richard and Daniel could become aligned against Verge from May of 2012 onward.

3. The nature of the action and the defences

19 On October 10, 2012, a statement of claim was issued and subsequently amended.

20 The amended statement of claim is 31 pages in length and has 113 paragraphs. Every cause of action imaginable is alleged,[3] and five types of damages are sought, totalling more than $29 million dollars.[4]

21 According to the amended statement of claim, it is explained that Verge earns revenues by commissions on the sale of insurance products to clients, with the commissions being based upon a percentage of the premiums paid by the clients to insurance companies. Verge also is paid monies by insurance companies in accordance with the level of sales of the products of those companies by Verge. Consequently, a loss of clients produces, at least, a double-barreled direct financial loss to Verge.

22 In their amended statement of claim, the plaintiffs allege, in part, that Richard: (1) breached his employment contract with Verge; (2) "breached the non-competition covenant in the Shareholders Agreement by entering into competitive activities against Verge and directing and encouraging clients to take their business to another brokerage"; (3) "breached his duty of confidence at common law and under his employment contract to keep all confidential information belonging to Verge in strict confidence"; (4) "breached his fiduciary duties owed to Mark and Verge by using confidential information and encouraging and assisting clients to cease doing business with Verge"; (5) "knowingly and intentionally used unlawful means and interfered in Verge's contractual relations by using confidential information relating to clients to encourage and assist the clients and insurance companies to take their business to a competitor"; and, (6) "conspired with Daniel, CSI, French [a co-owner of CSI], Pluska [the other co-owner of CSI] [and] Senn [a former senior executive of Verge] . . . to misappropriate the clients and confidential information of Verge for the purpose to injure Verge's business."

23 Similar allegations are made in the amended statement of claim against Daniel, but the central complaint seems to be that he wrongfully solicited the clients of Verge by using confidential information, including a client list he is said to have stolen from Verge when his employment was terminated, for the purpose of transferring business to CSI.

24 Daniel has counterclaimed, alleging wrongful dismissal.

25 As for CSI, the amended statement of claim contends that it: (1) "intentionally and knowingly encouraged and assisted" Daniel and Richard to breach their duties to Verge; (2) "has an ongoing plan to work with Daniel and Richard to use Verge's confidential information to solicit clients and take their business from Verge and assign the business to CSI"; (3) "misappropriated and misused Verge's confidential information relating to its clients"; (4) "knowingly and intentionally [together with Richard and Daniel] interfered with Verge's contracts and induced breach of contract"; and, (5) "conspired with Daniel and Richard to wrongfully terminate the contracts and relationships between Verge and its clients."

26 I hope that it is sufficient for me to say that Daniel, Richard and CSI deny all allegations. In addition, it is the position of Richard[5] that his dealings with CSI consisted of "providing mentoring to a novice producer and giving general advice to the proprietors of CSI." I will have more to say later about this "mentoring" defence.

4. The valuation application

27 The Shareholder Agreement between Richard and Daniel (actually, between their holding companies), as amended by a Memorandum of Understanding, contains a provision whereby if either Richard or Mark retires from Verge, he shall be paid a sum for his shares equal to their fair market value.

28 In accordance with the process agreed upon for the buy-out and for the valuation of the shares, Richard and Mark each retained an expert. As their respective valuations were more than 10% apart, a third expert was to be appointed to conduct an independent valuation. Agreement could not be reached on the selection of the third expert and there also was a dispute regarding the operative valuation date.

29 Therefore, on October 29, 2012, Richard commenced a court application to resolve the valuation issues ("the valuation application").

5. The Rule 15.02 motion by Richard

30 In late December of 2012, Richard brought a motion, pursuant to Rule 15.02 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, to stay the action on the grounds that Verge had failed to pass a resolution authorizing its commencement. The Rule 15.02 motion was returnable for January 17, 2013. It does not have much bearing on the issues before me, but it is part of the narrative, surfaces from time to time, and so requires mentioning.

6. The injunction notice of motion

31 By notice of motion dated and served on January 7, 2013, and returnable the week of January 21st,[6] the plaintiffs moved for injunctive relief against Richard, Daniel and CSI.

32 The injunctive relief requested was for six specific orders described in Schedule "A" to the notice of motion. I will set out the orders sought because it will be necessary for me to mention them again in these Reasons when carrying out a comparison with the orders actually made:

> (a) an order requiring the defendants to deliver up any of Verge's confidential documents and information in the defendants' possession, power or control, including, but not limited to all confidential information;

(b) an order prohibiting the defendants from using, reproducing, selling, disseminating or otherwise disclosing documents and confidential information belonging to Verge;
(c) an order requiring the defendants and their officers, directors, employees and agents to preserve all written communications between themselves, each other and clients regarding the use of Verge's confidential information including e-mails and other electronic communications;
(d) an order requiring the defendants and their officers, directors, employees and agents to diarize all verbal communications they have had or may have in the future relating to the confidential information of Verge and dealings with Verge's clients;
(e) an order prohibiting the defendants from soliciting or servicing Verge's present or former clients and prohibiting the defendants from interfering with Verge's contractual relations and economic interests;
(f) an order that Richard is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees or, in the alternative, Richard is ordered to resign as a director of [Verge] forthwith.

33 The grounds for the motion included the following:

.....

6. Richard and Daniel are former employees of Verge. They now work for CSI. Verge sued Richard and Daniel for, among other things, breaching their contractual and common law duties, taking and using Verge's confidential information, inducing breach of contract and/or interfering with contractual relations and conspiring against Verge.

.....

9. CSI is located in Burlington ... CSI is a small financially distressed brokerage. CSI benefited from Richard's transfer of Verge's confidential information, know-how, business processes and senior staff to CSI as well as his services as a consultant.
10. In effect, Richard [and] Daniel ... helped CSI establish a commercial insurance department to become a competitor of Verge. A dozen clients to date have transferred their business to CSI due to the solicitation of Daniel and Richard ...
11. Mark and Richard are 50/50 shareholders in Verge and the only two directors. Richard's conduct has created a shareholder/director deadlock ...
12. The defendants continue to misuse Verge's confidential information, business processes, know-how and senior employees to solicit Verge's clients and wrongfully compete against Verge.

.....

14. Richard is a fiduciary (at statute and common law) and he is causing irreparable harm to Verge and its reputation and goodwill in a small market ...

7. Adjournment of the injunction motion and failure to agree on terms

34 With the injunction motion having been served on January 7th and set for hearing on January 22nd, Daniel brought a motion with a return date of January 17th, seeking an adjournment. Although Richard was not asking for an adjournment, he did seek an order that his Rule 15.02 motion be heard in advance of the injunction motion.

35 The plaintiffs argue, often and strenuously, that the adjournment of the injunction motion sought by Daniel was unnecessary and a deliberate attempt to delay proceedings and that, furthermore, Richard, Daniel and CSI refused to engage in any meaningful discussions regarding settlement of the terms for the proposed adjournment.

36 Between January 14th and January 22, 2013, there were a great deal of communications among the parties concerning both the adjournment and acceptable terms for the adjournment:[7]

Jan. 14 Counsel for the plaintiffs sent this fax letter to counsel for Daniel:

> We are in receipt of your motion record which was served on Friday afternoon in respect of your client's motion to adjourn the injunction proceedings and quash the summons to witness.
>
> We are disappointed with the lack of cooperation that we have received from your office to date ...
>
> There is no doubt that you understood our discussion that we were proceeding with the motion for injunctive relief on January 21, 2013 as is evidence by you serving a motion record for an adjournment of that date ...

Jan. 14 At 12:48 p.m., counsel for Daniel replied to counsel for the plaintiffs:

> I have received your correspondence of today's date, and just sent to me ...
>
> With respect to argument of the motion, we can at least argue the adjournment on the 17th, given the urgency of the same ...
>
> I have been and still am willing to discuss a possible resolution ...

Jan. 14 Counsel for the plaintiffs sent a fax letter to all counsel setting out "the terms on which the [the plaintiffs] will consent to the adjournment" of the injunction motion on January 22nd "pending its

return on the long motion list in April 2013."

> The proposed terms were such that the plaintiffs were demanding that the defendants consent to the relief sought in their notice of motion in consideration for the adjournment.

37 January 15, 2013 was a particularly active day for counsel:

Jan. 15 At 10:35 a.m., counsel for Daniel sent an e-mail to counsel for the plaintiffs:

> Further to your letter of yesterday's date, enclosing your client's offer, I have reviewed the same with my client and it did not reflect the option of existing Verge clients that we wish to bid on ... However, the point may be moot as I have seen you have not reached an agreement with Rick Sherk or CSI ...
>
> I think it might be beneficial to have a call with all parties and if you are available this afternoon, I will attempt to schedule the same ...

Jan. 15 At 12:21 p.m., counsel for the plaintiffs replied to the above e-mail by text message:

> Please call my cell ...

Jan. 15 At 1:53 p.m., counsel for Daniel responded by e-mail:

> I just tried calling you, please let me know when you have a minute.

Jan. 15 Counsel for the plaintiffs sent this text message at 1:57 p.m.:

> Call again.

Jan. 15 At 3:03 p.m., counsel for Daniel e-mailed counsel for Richard and

counsel for CSI, saying:

> Please see below. I have taken the language from [counsel for the plaintiffs]' motion record, with my adjustments, to alleviate any further dispute. I have also attached Schedule 'A' to the order which lists the clients that will be excluded.
>
> Please let me know if the language is satisfactory as soon as possible and I will send the same to [counsel for the plaintiffs] in order for him to get instructions and let him know we are still waiting on our client instructions.

Jan. 15 At 3:33 p.m., counsel for Richard replied to counsel for Daniel:

> I just finished a conference call. Let me read this then call you in 5 to 10 minutes. Okay?

Jan. 15 At 3:39 p.m., counsel for Daniel e-mailed counsel for Richard:

> I am on the line. Is there any other comments regarding the language of the terms?

Jan. 15 At 4:08 p.m., counsel for Daniel e-mailed counsel for the plaintiffs:

> Please see below for the terms to the [proposed] adjournment. Everyone is obtaining instructions from their clients and I anticipate their answer before 5:00. Please let us know so I can prepare for tomorrow.
>
> Eight terms were set out. They largely are the same as those found in the 3:03 p.m. e-mail, but with some amendments.

Jan. 15 At 4:27 p.m., counsel for the plaintiffs answered with this text message:

> ... thanks for this. Do we also agree with the definition of Verge as noted in our order is to be incorporated into the consent interim order?
>
> Also what happens with Richard's [Rule 15.02] motion on Thursday? [January 17th]

Jan. 15 At 4:31 p.m., counsel for CSI e-mailed counsel for Daniel and Richard:

> ... can we:
>
> 1. leave out (b) - I really hate that one. That will get resolved at exams or discoveries.
> 2. in respect to (c), (d), could we restrict the application to clients other than those listed in Schedule 'A'.
> 3. forget about diarizing and delete (e).
> 4. in respect of (f) - has to also exempt any client that came to CSI while Dan was still at Verge. CSI may have old Verge clients that came over without Dan's or Rick's involvement.

Jan. 15 At 4:39 p.m., counsel for Daniel replied to the 4:27 p.m. text message from counsel for the plaintiffs:

> I think 'Verge' should be the company that is operating the business, Verge Insurance Brokerage, and not the other plaintiffs.

Jan. 15 At 4:53 p.m., counsel for Daniel e-mailed counsel for Richard and CSI:

> There seems to be no settlement. [Counsel for the plaintiffs] wanted the order to be all plaintiffs. I advised him that we would only agree that the injunction was for Verge and not Mark and all other plaintiffs. He said then there is no deal ...

38 On January 16th, there were further communications:

Jan. 16 Counsel for the plaintiffs faxed a letter to the other counsel, dealing

> with terms of the adjournment of the injunction motion, the motion by Richard to stay the action and the motion by Daniel to adjourn the injunction motion, the motion for leave to bring a derivative action "both of which are scheduled for ... January [22nd] ..."

Jan. 16 Counsel for Richard sent a comprehensive, four-page letter to counsel for the plaintiffs, in response to the above fax letter, dealing with the various pending motions.

39 The motions by Daniel (for an adjournment of the injunction motion) and by Richard (for a stay of the action under Rule 15.02) came before Walters J. on January 17th. Walters J. agreed that the Rule 15.02 motion brought by Richard should be heard first on January 22nd and that the injunction motion would be adjourned to a long-motion date in April.

Jan. 17 The endorsement of Walters J. reads:

> There are several motions before the court. After reviewing all materials and hearing submissions from counsel, it is apparent that these matters require more time than that allotted on the short motion list.
>
> The original motion of the plaintiffs is set for Tuesday, January 22/13 @ 10 a.m. In my view, all motions shall be adjourned to that date to be dealt with at one time. It is specifically understood that, except for the defendant Rick Sherk's motion pursuant to Rule 15.02 [to determine whether plaintiffs had authority to commence their action], court will be adjourned to another long motion date (likely April) after cross-examinations are completed. The presiding Justice will need to deal with terms of the adjournment and fixing of a schedule for the orderly completion of the motions.
>
> The parties are permitted to file any additional materials necessary for Tuesday's motion by Friday, January 18/13 @ 4 p.m.

8. The January 22nd interim injunction granted by Ramsay J.

40 The injunction motion and the Rule 15.02 motion came before Ramsay J. on January 22, 2013.[8] It being agreed that the injunction motion was to be adjourned, Ramsay J. set the contested terms for the adjournment.

41 Ramsay J. made seven orders "governing the adjournment of the plaintiffs' motion for injunctive relief." (Collectively, from time to time, I will refer to them as "the January 22nd interim injunction" or perhaps "the January 22nd order" or maybe even "the January 22nd interim order." I cannot make up my mind.)[9]

42 The first four orders made were identical to the first four orders requested in Schedule "A" to the notice of motion, at paragraphs (a) through (d).

43 The fifth order made by Ramsay J. has a sentence added to that which appears in the notice of motion at paragraph (e).

44 The seventh order made was not expressly sought in the notice of motion.

45 I will set out the orders requested in Schedule "A" of the notice of motion and those orders granted by Ramsay J., underlining the additions in the latter to permit comparison with the former:

Orders sought in notice of motion	Orders made by Ramsay J.
(a) an order requiring the defendants to deliver up any of Verge's confidential documents and information in the defendants' possession, power or control, including, but not limited to all confidential information;	(1)THIS COURT ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI Insurance Brokers Ltd. ('CSI'), deliver up any of Verge's confidential documents and information in the defendants' possession, power or control including, but not limited to all confidential information.
(b) an order prohibiting the defendants from using, reproducing, selling, disseminating or otherwise disclosing documents and confidential information belonging to Verge;	(2) THIS COURT FURTHER ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI are prohibited from using, reproducing, selling, disseminating or otherwise disclosing documents and confidential information belonging to Verge.
(c) an order requiring the defendants and their officers, directors, employees and agents to preserve all written communications between themselves, each other and clients regarding the use of Verge's confidential information including e-mails and other electronic communications;	(3) THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel Sherk and CSI and their officers, directors, employees and agents to preserve all written communications between themselves, each other and clients regarding the use of Verge's confidential information including e-mails and other electronic communications.
(d) an order requiring the defendants and their officers, directors,	(4) THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel

employees and agents to diarize all verbal communications they have had or may have in the future relating to the confidential information of Verge and dealings with Verge's clients;	Sherk and CSI and their officers, directors, employees and agents requiring the defendants and their officers, directors, employees and agents to diarize all verbal communications they have had or may have in the future relating to the confidential information of Verge and dealings with Verge's clients.
(e) an order prohibiting the defendants from soliciting or servicing Verge's present or former clients and prohibiting the defendants from interfering with Verge's contractual relations and economic interests;	(5) THIS COURT FURTHER ORDERS that defendants, Richard Sherk, Daniel Sherk and CSI, are prohibited from soliciting or servicing Verge's present or former clients and from interfering with Verge's contractual relations and economic interests. CSI is not prohibited from servicing Verge's former clients who have decided to go to CSI without having been solicited by the defendants, Richard Sherk, Daniel Sherk and CSI.
(f) an order that Richard is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees or, in the alternative, Richard is ordered to resign as a director of [Verge] forthwith.	(6) THIS COURT FURTHER ORDERS that Richard Sherk is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees. [10]

(7) THIS COURT FURTHER ORDERS that for the purposes of this order, the plaintiff, Verge, includes the following companies:

Stewart McGuiness Insurance
Brokers Ltd.
1254224 Ontario Inc.
(Reimer-Verge)
Kannegieter-Zimmerman Ins.
Brokers Ltd.
A.B. & J.L White Insurance

Brokers Ltd.
1255653 Ontario Inc.
(Milmine Insurance)
1729628 Ontario Inc.
Niagara Insurance Managers Ltd.
Marick Bros. Investments Ltd.
1760107 Ontario Inc.

9. The endorsement of Ramsay J.

46 In his handwritten endorsement of January 22nd, Ramsay J. observed that Richard had not, at this point, filed an affidavit in opposition to the injunction motion and that the plaintiffs had a strong *prima facie* case against Richard for breach of fiduciary duty:

> This is an uncontested adjournment, but the terms are contested. On the evidence before me, which Richard Sherk has not contested, although he had time to do so, at least to the extent of filing an affidavit, the plaintiffs have a strong *prima facie* case of breach of fiduciary duty by him with resulting irreparable harm. The balance of convenience favours these two considerations in all of the circumstances ...
>
> In the case of Daniel Sherk and CSI, the *prima facie* case ... is not as strong as the one against Richard Sherk. It is still significant however ...

47 Ramsay J. then adjourned the injunction motion and went on to stipulate a timetable for the filing of further material and for cross-examinations:

> The motion for an interlocutory injunction is adjourned to be heard on a long motion list April 11, 2013 . . . I order the following timetable:
>
> Plaintiffs to file their material by Feb. 15, 2013
>
> Defendants to file reply material by Feb. 22, 2013
>
> Cross-examinations to be completed by Feb. 28, 2013
>
> Factums to be served and filed by April 5, 2013.

48 Costs were reserved to the judge hearing the injunction motion.

49 The Rule 15.02 motion, brought by Richard, was dismissed with costs:

> The plaintiffs did better than they offered. I order costs against the defendant, Richard Sherk, on a partial indemnity basis.

50 Those costs were fixed at $5,000.00 and have been paid.

10. Taking out the January 22nd order - a saga

51 In litigation, conflict is a contagious condition. It is not unusual for counsel to manifest a level of conflict varying directly with that exhibited by their client. Here, this phenomenon can be seen in respect of the settling of the form and content of the interim injunction that was granted on January 22nd by Ramsay J. I will trace some of the communications touching on the matter:

Jan. 25 Counsel for the plaintiffs sent a fax letter to all counsel at 12:17 p.m.:

> Yesterday we sent the draft terms of Justice Ramsay's order to you for approval as to form and content. I have not heard from any counsel yet and I require that the order be signed off and approved by the end of the day today,[11] failing which we will seek an appearance before Justice Ramsay next week to have the order issued and entered.
>
> It is important for the interim injunction to be in a court order[12] and my client has discovered today that one of Daniel Sherk's clients has cancelled its policy and the terms of discussion with this client gives rise to serious concerns that the defendants are not complying with the court order.

Jan. 25 In response to the 12:17 p.m. fax, the law clerk to counsel for Daniel sent an e-mail to counsel for the plaintiffs:

> ... [Counsel for Daniel] is currently out of the office today. I will bring your letter to his attention on Monday.
>
> January 25th was a Friday.

Jan. 25 Counsel for the plaintiffs replied by e-mail six minutes later:

> Thank you, however, this letter should be provided to him now.

52 January 29th was a busy day in the quest to settle the form and content of the January 22nd order:

Jan. 29 Counsel for Daniel sent an e-mail to counsel for the plaintiffs at 9:45 a.m.:

> Paragraph 7 of your order does not comply with the endorsement. The companies listed therein are not the companies listed in Schedule 'A' of your notice of motion.

Jan. 29 At 9:53 a.m., counsel for the plaintiffs sent a text message to counsel for Daniel:

> I don't follow you. Paragraph 7 reflects the companies listed in Schedule 'A' when we define Verge. Please be more specific as to the problem as we will be seeking a date this week before Justice Ramsay if the order is not approved by the parties.

Jan. 29 Three minutes later, counsel for Daniel responded with this e-mail:

> Perhaps I'm mistaken but the Schedule 'A' I have does not list all of those companies.
>
> You have mentioned making an appointment with His Honour a couple of times. You are obviously free to do so as you wish.

Jan. 29 At 10:00 a.m., counsel for the plaintiffs sent this e-mail to counsel for Daniel:

> It is our duty as counsel to agree on the terms and going to court is the last resort.
>
> Please be specific how our order is defective.

Jan. 29 At 10:07 a.m., the assistant to counsel for the plaintiffs sent an e-mail to counsel for Daniel:

> Please see attached a copy of Schedule 'A' (p.15, 16) from our motion record. The companies listed are the same as in our draft order.[13]

Jan. 29 At 11:43 a.m., counsel for the plaintiffs forwarded a further text message to counsel for Daniel and all other counsel:

> Now that you have the documents before you, are your concerns resolved?
>
> May I hear from other counsel if they approve the order?

Jan. 29 Counsel for Daniel replied to counsel for the plaintiffs at 11:58 a.m.:

> I am in discoveries. Unless there is an urgent reason to keep e-mailing me, I will advise you when I am done. Thanks.

Jan. 29 Counsel for the plaintiffs sent this e-mail to all counsel at 4:11 p.m.:

> Gentleman, quite frankly, I have never seen anything like this. A court order on an injunction deserves the utmost respect by the parties and requires counsel to approve the order in a timely way. The silence here is unprecedented.
>
> We are contacting the court to arrange an appointment to settle the order. We will keep you posted.

Jan. 29 Eighteen minutes later, counsel for the plaintiffs sent a follow-up e-mail to all counsel:

> We have an appointment before Justice Ramsay on Monday at 10 a.m. in St. Catharines. We will serve the notice tomorrow. In the interim, please direct any concerns about the draft order to me.
>
> I do hope this appointment can be avoided.

Jan. 29 At 4:46 p.m., counsel for Daniel e-mailed counsel for the plaintiffs:

> I have responded and intend to discuss this matter with counsel tomorrow.

Jan. 29 At 5:28 p.m., counsel for the plaintiffs forwarded this e-mail to all counsel:

> Gentleman, my client has lost three clients in Dan's book this week. This is a serious issue.

Jan. 29 Counsel for CSI sent this e-mail to counsel for the plaintiffs at 6:52 p.m.

> You are making a statement and the inference is that the clients were lost to Dan/CSI. Please provide some specificity as to the clients lost and to whom they were lost so that I can discuss this with my client.

53 And January 30th also was a full day:

Jan. 30 At 6:39 p.m., counsel for the plaintiffs forwarded this e-mail to all counsel:

> You have a professional and ethical duty to approve our court order. Is there a reason why no one has done so or pointed out real problems with it?
>
> I am at a loss to what counsel believe they are doing.

Jan.30 At 6:44 p.m., counsel for Daniel replied to counsel for the plaintiffs:

> I am sorry but I have been dealing with a personal emergency all day and have not been in the office. However, rest assured we are dealing with your draft order.
>
> I have had a chance to discuss your order with counsel and I believe they are preparing a response. If we cannot resolve the issue then we may well have to go before Justice Ramsay. However, I would

> appreciate scheduling the date with counsel as I cannot attend Monday morning.
>
> This may fall on deaf ears but I would appreciate dealing with this tomorrow when I am back at the office and our joint response has been received. Thank you.

Jan. 30 At 6:46 p.m., counsel for the plaintiffs sent this e-mail to counsel for Daniel:

> This is embarrassing for counsel on the defendants (sic) side.

Jan. 30 Eight minutes thereafter, counsel for Daniel e-mailed counsel for the plaintiffs:

> So I can understand; I advised you that I have been [dealing] with a personal emergency and ask for the courtesy of dealing with this tomorrow after you receive our joint response and, without knowing anything more, you respond with [your 6:46 p.m. e-mail]?
>
> I am surprised with the lack of professional courtesy and we can deal with this tomorrow when you receive our joint response.

Jan. 30 At 7:03 p.m., counsel for the plaintiffs replied to counsel for Daniel by e-mail:

> Please raise my lack of professional courtesy on Monday before Justice Ramsay.[14]

54 Counsel for Daniel provided something of a summary letter on January 31st:

Jan. 31 Counsel for Daniel sent a letter to counsel for the plaintiffs by way of an e-mail attachment, summarizing the matters addressed in recent e-mails and communications and providing additional information. I will set out some passages: (Emphasis in original)

... With respect to my objection [to the content of the January 22nd order], while your position may be that I am wrong, I am required to discuss the matter with opposing counsel, review the endorsement AND the transcript, to determine if His Honour dealt with Verge being defined as it was in paragraph 7 of your draft order. Given the severity of the order, I do not think that is reasonable.

Furthermore, I think it is important that we review the time line of your letters and demands that we approve your clients' draft order.

You sent us your clients' proposed draft order on Friday afternoon. My assistant advised you that I was not in the office and that she would bring the same to my attention on Monday, and you presumed to instruct her to send it to me that day.

On Tuesday morning, I sent you an e-mail outlining a concern I have with your order, to which you responded. At that time, I was in examinations ... and advised you that ... unless the matter was urgent, to please e-mail me tomorrow. You ignored my e-mail and continued to e-mail me stating that you would bring the matter before Justice Ramsay. This was two business days following your initial letter enclosing the draft order.

On Tuesday night, I was dealing with a family emergency and I was not able to deal with this issue that night or most of the day Wednesday. While I am embarrassed to reveal such a sensitive personal issue and find it improper and unprofessional to have to, your conduct and allegations that I am doing something untoward have left me no choice. [Counsel then explained that his wife was having problems with her pregnancy.] ... Consequently, while I am sure my personal matters are 'irrelevant' to you, they are **very** relevant to me and are why I have not been able to deal with this as quickly as you demand.

... in my e-mail responding to yours sent to me last night, I advised you that I was dealing with a personal emergency and that you respect my time and deal with this issue in the morning. You ignored the same and sent insulting e-mails to me.

Furthermore, it was two business days from you sending your draft order to you making an appointment with Justice Ramsay. Again, with no input from myself.

The letter then went on to address the problems with the draft order:

> I was able to schedule a conference call with all counsel yesterday to deal with your draft order and, more importantly, review the transcripts of Justice Ramsey's endorsement. I can advise you that your draft order does not comply with the endorsement for the reasons in my previous e-mails and Mr. Wigle's letter of even date.
>
> The letter concluded by dealing with the attendance upon Justice Ramsay:
>
> ... I once again advise you that I am unavailable on Monday as I have to attend a Board of Directors meeting at 8:00 a.m. for the Ronald McDonald House. However, I am available any other day but Thursday, as I need to attend the hospital with my wife.
>
> If you are intending to proceed on the Monday date, please advise right away.

11. The February 4th attendance to settle the January 22nd order

55 At the insistence of counsel for the plaintiffs, on February 4, 2013, all counsel attended upon Ramsay J. to settle the terms of the January 22nd order.

56 In particular, counsel for Richard and counsel for the plaintiffs disagreed on the contents of paragraph 6 of the order. After hearing submissions, Ramsay J. granted the request by counsel for Richard and added this sentence to paragraph 6:

> Richard Sherk is allowed to support his son Daniel in the context of a father-son relationship.

57 I will set out paragraph 6 in its three incarnations, with the sentence added by Ramsay J. underlined:

Notice of motion	Order made on January 22nd	Order amended on Feb. 4th
(f) an order that Richard is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees or, in the alternative, Richard is ordered to resign as a director of [Verge] forthwith.	(6) THIS COURT FURTHER ORDERS that Richard Sherk is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees.	(6) THIS COURT FURTHER ORDERS that Richard Sherk is prohibited from working for, financially supporting and advising CSI or its officers, directors, shareholders and employees. Richard Sherk is allowed to support his son Daniel in the context of a father-son relationship.

58 Consequently, it cannot be said, as is argued by the plaintiffs, that there was anything improper in the refusal by the defendants to approve the draft January 22nd order prepared by counsel for the plaintiffs.

12. Interpretation difficulties over the January 22nd order

59 With the content of the January 22nd order finally resolved, one would think that counsel could proceed to other issues. One would be wrong.

60 There arose a difference of opinion over the interpretation of paragraphs 1 and 3 of the January 22nd order. In paragraph 1, reference is made to the obligation on the defendants to "deliver up" confidential documents and, in paragraph 3 of the order, the defendants are asked to "preserve all written communications between themselves ... regarding the use of Verge's confidential information including e-mails and other electronic communications."

61 Counsel for the plaintiffs took the position, from the outset, that "preserve" was the equivalent of "produce," with the result that there were demands on behalf of the plaintiffs not just for confidential documents but for the production of *all* e-mails and text messages.

62 Counsel for the defendants argued, correctly, in my view, that there is a distinction between the two terms. "Preserve" does not mean "produce."

63 This dispute in interpretation is evident in the way the cross-examinations were conducted and in the surrounding documentary chaos.

13. Documentary chaos

64 Leading up to the commencement of the cross-examinations of the parties on their affidavits, scheduled to begin on February 25th, there was a frenzied exchange of communications in respect of the documents that were being demanded by counsel for the plaintiffs:

Feb. 20 — There was a telephone conference call involving all counsel during which they "discussed a timetable for the cross-examination of several deponents of affidavits."

Feb. 21 — Counsel for Richard forwarded a letter to all counsel, following the conference call on February 20th, and setting out the timetable and scheduling of the cross-examinations. The letter included this reference:

> I believe that [counsel for the plaintiffs] proposed that notices of examination not be required. I will consider this proposal, but I am not waiving our right to serve such a notice.

Feb. 22 — Counsel for the plaintiffs wrote to all counsel:

> Pursuant to Justice Ramsay's order, we are required to conduct our cross-examinations next week and to date the defendants have failed

> to comply with Justice Ramsay's order to produce the confidential information of Verge that is in their possession.
>
> As might be expected, this breach of Justice Ramsay's order will negatively affect our ability to cross-examine the defendants. Therefore, we reserve the right to continue the cross-examination of the defendants once the confidential information is produced pursuant to Justice Ramsay's order.
>
> In addition, Verge has learned today that Brenda French [the co-owner of CSI] contacted Brownstone Insurance Managers in Ancaster in the summer of 2012 for the purpose of brokering a $2.5 million book that is coming available to her as a result of hiring a new producer, Daniel Sherk, and the book is presently held by Verge Insurance in St. Catharines. In the course of this meeting, she provided a business plan to substantiate her request for the brokering arrangement. Please produce the business plan submitted to Brownstone by the end of business today.

65 Imagine receiving the following e-mail on a Saturday and two days in advance of scheduled cross-examinations:

> Feb. 23 Counsel for the plaintiffs sent an e-mail to counsel for Richard at 10:59 a.m. (the 23rd was a Saturday):
>
> > Please find below the documents that we require your clients to produce for their cross examinations.
> >
> > Request:
> >
> > For the purposes of this request, 'Verge' is defined in the same way as in Schedule 'A' to Justice Ramsay's order. 'Documents' means anything in paper or electronic form.
> >
> > (Emphasis in original)
> >
> > **Dan Sherk's Productions**
> >
> > - drafts or final contract of employment or for service with CSI
> >
> > - all paper and electronic (including emails, texts, facebook or tweets) between Dan and the other defendants, Senn [a former senior executive with Verge] and Holbrook and Verge clients or prospective Verge clients between May 2011 and the present

- all CSI's or Daniel's marketing documents (in paper or electronic form) created and or sent to existing Verge clients or CSI's existing or prospective clients in the Niagara Region

- the commission and bonus paid to Dan by CSI and all paycheques and supporting documents from CSI in the period of May 2012 to the present

- Dan's legal accounts or bills or invoices in the period of May 2012 to the present

- all notes of document or draft versions relation to Dan's employment or service contract with CSI

- all documents (in paper or electronic form) relating to correspondence between Dan, Sandra Cleland, Sandra McQuaid whether in Dan's email, phone, blackberry, computer or any other electronic storage device in the period of the May 2011 to the present

- any legal opinions in draft or final form provided to Dan and CSI regarding the validity of his employment contract with Verge and his right to compete against Verge after the termination of his employment and all documents relating to Dan's efforts to buy his book of business from Verge including correspondence or plans to have a broker, reinsurer, insurer or some other entity finance or assist in the purchase of Dan's book from Verge

- all documents (in paper or electronic form) with insurers, brokers, reinsurers, Verge clients regarding the defendants' dispute with Verge

Rick Sherk's Productions

- his draft or final employment or service contract with CSI

- all paper and electronic correspondence between Rick, Dan and CSI, Senn, French, Pluska in the period of the summer of 2011 to the present

- all documents (in paper or electronic form) relating to discussions that Rick had with Verge producers (past and present) or employees (past and present) regarding their departure from Verge to start a competing brokerage against Verge in the period of 2010 to the present (including Ed Plutt, Ryan Lindsay and Scott McMullen)

- all documents (in paper or electronic form) between Rick and present or past Verge clients from 2010 to the present

- any records or cheques relating to payments made to Dan or on his behalf including his legal fees or expenses from May 2012 to the present

CSI's Productions

- any business plan submitted to Aviva, Brownstone or any other insurer, reinsurer, broker, bank or any other entity in connection with the financing of the purchase of Verge clients or Dan's book of business or where Verge clients or Dan's book of business is discussed as consideration for access to markets or any other purpose from May 2012 to the present

- drafts or final contract for employment or services between CSI and Rick or Dan or Senn or Holbrook

- the market submissions and all client information used relating to the accounts that CSI wrote in regard to Verge past or present clients in the period of May 2012 to the present

- all marketing documents sent to existing or past Verge clients or existing or prospective CSI clients or for the Niagara Region general market including insurers and other brokers in the period of May 2012 to the present, as well as all marketing or correspondence relating to the hiring of Dan Sherk in the same period

- any business plan in draft or final form or any discussion papers or any documents regarding the expansion of CSI into the Niagara Region

- all documents bearing the name of CSI Niagara or identifying CSI as having a presence in the Niagara market

- all documents relating to the commission rates or bonus or payments to Dan Sherk from May 2012 to the present, including all paychecks issued to him and supporting documents.

A notice of examination was not served.

66 And the following exchange of e-mails took place *the day before* the scheduled cross-examinations:

Feb. 24 At 4:14 p.m., counsel for Daniel forwarded an e-mail to counsel for the plaintiffs:

> Further to Justice Ramsay's Order we would like to respond as follows:
>
> 1. We have complied with paragraph 1 as Dan does not have any of Verge's confidential information;
> 2. We have complied with paragraph 2 and not used, nor will/can we use, any of Verge's confidential information;
> 3. Given we have not used any of Verge's Confidential information, we have complied with paragraph 3. While there are no emails dealing with confidential information to preserve, Dan is preserving any and all emails on Dan's blackberry used during his employment with Verge. In order to obtain all emails, texts, etc., we will require the four digit PIN with the service provider so we can obtain any and all emails, texts messages, etc. Please provide.
> 4. We have complied with paragraph 4 of the Order and diarized any and all verbal communications;
> 5. In accordance with paragraph 5 of the Order, we have not solicited or serviced any Verge client
> 6. N/A
> 7. N/A
>
> This letter goes on to raise the interpretation difficulty that I mentioned earlier:
>
> I further note that Justice Ramsay's order is simply a preservation order and, other than paragraph 1 of the Order, we do not have an obligation to produce any further documents, and consequently have complied with the order.

Feb. 24 At 04:38 p.m., counsel for Daniel sent an e-mail to counsel for the plaintiffs:

> Firstly I would like to put you on notice that many statements in your clients reply material (which include all affiants) is not in reply to our affidavit, but raise many new issues that may require additional information from our client. I have attached a short affidavit dealing with some of the blatant issues and if you take issue with the same, we can deal with it at the motion.

Secondly, we would be happy to produce relevant documentation to assist in the examinations, but the timeliness of your request is unreasonable and impossible. You requested exhaustive list of documents sent on Saturday, which I saw on Sunday afternoon for the first time, for examinations on Monday; is unreasonable. With the greatest of respects, it seems that the request was made with knowledge or expectation that it could not be complied with, for reasons we can only assume. You have had my client's material for over a week and if you required documentation, the same should have been requested at some point last week, during the work week, and not the eve of examinations, when everyone is home for the weekend.

I note that we have given you over 10 days to comply with our request for documentation, and expect the same brought to Mr. Sherk's examinations.

However, without admitting or stating our position with respect to the relevance and/or admissibility of your requested documents, we respond as follows.

(Emphasis in original)

- drafts or final contract of employment or for service with CSI - **in the possession of Verge - will attempt to produce any and all agreements in our possession.**

- all paper and electronic (including emails, texts, facebook or tweets) between Dan and the other defendants, Senn and Holbrook and Verge clients or prospective Verge clients between May 2011 and the present **Cannot obtain, review and/or assess relevancy in less than 24 hours and consequently will not be produced**

- all CSI's or Daniel's marketing documents (in paper or electronic form) created and or sent to existing Verge clients or CSI's existing or prospective clients in the Niagara Region - **Cannot obtain, review and/or assess relevancy in less than 24 hours and consequently will not be produced**

- the commission and bonus paid to Dan by CSI and all paycheques and supporting documents from CSI in the period of May 2012 to the present - **Cannot obtain, review and/or assess relevancy in less than 24 hours and consequently will not be produced**

- Dan's legal accounts or bills or invoices in the period of May 2012 to the present **Will not produce, Not in our affidavit, not relevant**

- all documents (in paper or electronic form) relating to correspondence between Dan, Sandra Cleland, Sandra McQuaid whether in Dan's email, phone, blackberry, computer or any other electronic storage device in the period of the May 2011 to the present - **Require PIN from Verge and will work with Verge to obtain once PIN is provided**

- any legal opinions in draft or final form provided to Dan and CSI regarding the validity of his employment contract with Verge and his right to compete against Verge after the termination of his employment and all documents relating to Dan's efforts to buy his book of business from Verge including correspondence or plans to have a broker, reinsurer, insurer or some other entity finance or assist in the purchase of Dan's book from Verge - **Cannot obtain, review and/or assess relevancy in less than 24 hours, given not in my possession, and consequently will not be produced. However our initial position is that we will not produce any legal opinions as the same was obtained in the context of Dan's counterclaim and therefore it is privileged.**

- all documents (in paper or electronic form) with insurers, brokers, reinsurers, Verge clients regarding the defendants' dispute with Verge - **Cannot obtain, review and/or assess relevancy in less than 24 hours and consequently will not be produced**.

Feb. 24 At 4:50 p.m., counsel for the plaintiffs forwarded an e-mail to counsel for Daniel:

We don't practice law like that. We know the request was with short notice but we were responding to the defendants' late production of affidavits.

The Defendants also refused to produce the documents under Ramsay J order nor have they attempted to review them to date.

As a result, we expect that there will undertakings to produce documents and we can handle the document production that way. Perhaps there may be continuation of the crosses of the defendants due to the lack of production under Ramsay J's order.

In any event, I am not happy with your tactics of attacking our professionalism. We need to decrease the conflict here.

67 There even were communications on Monday, February 25th, *the day of* the cross-examinations:

Feb. 25 Counsel for Daniel sent an e-mail to counsel for the plaintiffs at 9:33 a.m.:

> Firstly, my productions were not late and served in time.
>
> [Co-counsel for the plaintiff]s email did not indicate that you wished to proceed with the documentation as you have indicated below. In fact it stated they were needed FOR our clients' cross-examinations. If your intention was to proceed as set out below, I would have hoped it would have been in the email requesting the documentation.
>
> Further, I am not attacking your professionalism in my email. Given Mrs. Pollard's email, I needed to respond and outline my client's position.
>
> With respect to the conduct of the parties and decreasing conflict, the emails speak for themselves and I will let the courts decide the issue when we argue costs, as opposed to getting into an argument with you and increasing conflict.

68 Based upon the above chaotic chain of communications, is anyone really surprised that the cross-examinations did not proceed uneventfully?

14. The cross-examinations on affidavits

69 In accordance with the timetable established by Ramsay J., Richard and Daniel were cross-examined on their affidavits on February 25, 2013, during which they were asked to produce documents alleged by the plaintiffs to be relevant to the motions. As I understand the matter, the plaintiffs had a particular interest in *all* communications between or among Richard, Daniel and CSI since the summer of 2011. Production was denied (and rightly so if the request was for *all* communications, without any concern for relevance).

70 Thereafter, additional cross-examinations were held as follows:

Feb. 26 Brenda French, co-owner of CSI, swore an affidavit in response to the injunction motion. Among other matters, it specifically addresses the affidavits from Mark sworn January 7 and 16, 2013 and February 7, 2013.

Feb. 26 Brenda French was cross-examined on her affidavits of January

18th, February 15th, 2013 and February 26th.

Mar. 1	Mark was cross-examined, during which he alleged that Spectrum Healthcare and at least five other customers in Richard's former book of business were "lost" or were "under attack." However, the plaintiffs now concede that Spectrum Healthcare is the only such customer to have left Verge (and it did so of its own volition).
Mar. 4	Sandra Cleland, a Verge employee, was cross-examined on her affidavit sworn January 4, 2013.
Mar. 4	Christine Aucoin, an employee of Verge, was cross-examined on her affidavit.
Mar. 7	Doug Homeniuk, an account executive with Aviva Insurance Company of Canada, was cross-examined on his affidavit sworn January 18, 2013.

15. The New Productions

71 On April 8, 2013, Richard reconsidered his refusal to produce communications with the other defendants and he supplied approximately 50 pages worth of heavily redacted e-mails and text messages. Counsel have referred to this material as "the New Productions" and, sometimes, "the New Documents."

16. The production motion

72 Unhappy with the completeness of the documentary disclosure from the defendants that occurred in conjunction with the cross-examinations, the plaintiffs served a motion on April 10, 2013 to compel production of the New Documents/New Productions and, in addition, seeking what are being called "Further Documents" from Richard, Daniel and CSI. In part, the notice of motion asks that they "produce all communications, in a complete and unredacted form" among themselves and other named persons "whether in printed or electronic form ... from May 2011 to the present."

73 On April 10th, counsel for the plaintiffs stated in a letter to all counsel:

> At the cross-examination of your clients, you refused to provide copies of all relevant communications, electronic or otherwise, between your clients and the other defendants for the period from May 2011 to present. Subsequent to his cross-examination, Richard Sherk on April 8, 2013 produced copies of a number of heavily redacted e-mails and text messages between the various defendants that clearly evidence ongoing communications between your clients and various other defendants ...

> In light of this development, we again ask that your clients produce copies of all communications between Daniel Sherk, Richard Sherk, Brenda French [co-owner of CSI], Ruth Pluska [the other co-owner of CSI], Andree Senn [a former senior executive with Verge], Maureen Holbrook ...
>
> We will be seeking an order from Justice Quinn on April 22, 2013 requiring your clients to produce these documents and re-attend cross-examination should you fail to consent to this arrangement.

74 Having received the above letter and been served with the motion record of the plaintiffs, counsel for CSI sent a fax letter to counsel for the plaintiffs on April 12th:

> In response to your letter ... dated April 10, 2013, please be advised that our client will not attend on Monday to 'continue the cross-examinations on new documents produced by Richard Sherk and the further documents produced by your clients.' We consider your request to be inappropriate ...
>
> We confirm receipt of your clients' motion record [the production motion] this afternoon with respect to a motion purportedly made returnable April 22, 2013, which was served late. We do not believe your clients are entitled to bring this motion ... It seems that your clients are attempting by this motion to sidetrack the injunction motion ...

75 The notice of motion for the production motion was comprehensive and requested the following relief:

> 1. An order that Daniel Sherk, Richard Sherk and Brenda French produce all communications, in a complete and un-redacted form, between Daniel Sherk, Richard Sherk, Brenda French, Ruth Pluska, Andree Senn [a former senior executive with Verge], Maureen Holbrook and any other employee or agent of Cal Schultz Insurance Brokers Ltd. ('CSI'), whether together or not, whether in printed or electronic form, in the period of May 2011 to the present, regarding:
> (a) any former or current client of Verge Insurance Brokers Limited ('Verge') as defined in Justice Ramsay's order of January 22, 2013;
> (b) any solicitation, contact with or discussion with or about a present or past Verge client;
> (c) any servicing of any former or present Verge client, including communications with insurers, brokers, agents, consultants or intermediaries;
> (d) any operational or financial input into or advice by Richard Sherk into CSI's business, human resources, finances, markets, clients or otherwise;
> (e) any transmittal or reference to or discussion of Verge's client list or confidential information as defined in section 7 of Verge's standard employment contract;
> (f) any storage or holding of commissions for Daniel Sherk or prepayment of commissions to Maureen Holbrook as a result of Daniel Sherk's efforts.
> (g) any records or discussions relating to 'producer code A4,' as referenced in certain documents produced by Richard Sherk subsequent to his cross-examination on his affidavit ("New Documents");[15]

(h) any discussions or records relating to contracts between CSI and/or Daniel Sherk, Richard Sherk, Maureen Holbrook or any formal or informal understanding of the relationship between CSI and Richard Sherk and Daniel Sherk and Maureen Holbrook;

(all of which documents are hereinafter referred to as the "Further Documents");

2. Leave, if necessary, to file the New Documents and the Further Documents with the Court for use on the hearing of the motion for the injunction;
3. An order that Daniel Sherk, Richard Sherk and Brenda French re-attend to be cross-examined, at their own expense, at a time a place to be agreed or as determined by the plaintiffs, on all issues arising from or related to the New Documents or the Further Documents;
4. An Order requiring the defendants to identify all media devices and email accounts (including email address) used during the period of May 2011 to present including but not limited to all computers, smartphones, ipads, tablets, usb sticks, memory sticks, external hard drives ('the Identified Media Devices and Email Accounts') in which relevant documents might be stored;
5. An Order requiring the defendants to preserve the Identified Media Devices and Email Accounts including metadata as follows:

   (i) Computers/Smartphones/Ipads/Tablets/USB Sticks/Memory Sticks External Hard Drives: Preserve all such devices by having a forensically sound copy made which preserves all metadata;
   (ii) Blackberries: Preserve all such devices by having a forensically sound copy made which preserves all metadata;
   (iii) Webmail: Preserve all such webmail accounts by first re-activating any closed accounts then downloading the account from the webmail account into an archive and maintaining full headers and documenting the process used;

6. An order requiring the defendants to review all documents (whether in hardcopy or electronic form) in the defendants' possession, power or control, including but not limited to all documents residing on the Identified Media Devices and Email Accounts, including deleted emails or documents, for the purposes of determining if they contain any of the New Documents or Further Documents and to produce complete and un-redacted copies of any New Documents or Further Documents;

76 The plaintiffs rely upon these grounds in their notice of motion (which provide a useful summary of how the parties reached this point):

1. Daniel Sherk, Richard Sherk and Brenda French (collectively the 'Affiants') have all filed affidavits in response to a motion for an injunction brought in this action by the plaintiffs;

2. The Affiants were all cross-examined on their affidavits filed in respect of the motion for an injunction;
3. Despite a specific request made of each of the Affiants, to bring all documents relevant to the motion for an injunction with them to their respective cross-examinations and in particular, 'all paper and electronic (including emails, texts, facebook or tweets)' between the defendants for the period between May 2011 and the present, the Affiants failed to produce any of the New Documents or the Further Documents;
4. Further, when asked on cross-examination to produce copies of all relevant communications between the defendants for the period between May 2011 and the present, each of the Affiants refused to do so;
5. Subsequent to his cross-examination, Richard Sherk, on April 8, 2013, produced to counsel for the plaintiffs, the New Documents, consisting of approximately 500 email and text messages between Daniel Sherk, Richard Sherk, Brenda French, Ruth Pluska, Andree Senn, Maureen Holbrook and other employees or agents of CSI and concerning various matters relevant to the motion for an injunction, many of which were heavily redacted;
6. Despite further requests made of Richard Sherk, he has refused to produce un-redacted copies of the New Documents or to produce copies of the Further Documents that might be in his possession or control;
7. Despite further requests made of Daniel Sherk and Brenda French, they have refused to produce copies of the Further Documents in their possession or control;
8. A review of the New Documents indicates that there were continuing and numerous communications between Daniel Sherk, Richard Sherk, Brenda French, Ruth Pluska, Andree Senn, Maureen Holbrook and other employees or agents of CSI that are relevant to the motion for the injunction and that a number of further relevant documents may exist that have not been produced;
9. As many of the New Documents were redacted prior to production, it is not possible for the plaintiffs to ascertain the entire contents of those documents or determine if relevant information has been deleted;
10. The plaintiffs will be prejudiced if they are required to proceed with the motion for an injunction without having complete and un-redacted copies of the New Documents and the Further Documents and an opportunity to cross-examine the Affiants on any such documents;
11. In particular, it is the position of the plaintiffs that many of the New Documents contradict the evidence of the Affiants and, accordingly, the plaintiffs are obliged to put those documents to the Affiants to allow them to address these alleged contradictions in accordance with the Rule in *Browne v. Dunn*;
12. Procedural fairness requires that the plaintiffs have access to and an opportunity to cross-examine on complete and un-redacted copies of the New Documents and the Further Documents prior to the hearing of the motion for the injunction in this matter;
13. The plaintiffs have incurred additional costs, and will continue to incur additional costs, as a result of the conduct of the Affiants in failing to produce relevant

documents at their cross-examinations or in response to subsequent requests made of them;

77 The notice of motion cites Rules 34.10, 34.12 and 34.14 of the *Rules of Civil Procedure*. During oral argument of the production motion, counsel for the plaintiffs added Rule 34.15 as a further Rule being relied upon.

78 Rule 34.10(2)(b) requires a person to bring to "any examination ... all documents ... that the notice of examination ... required the person to bring."

79 Rule 34.10(3)(a) provides that a notice of examination "may require the person to be examined to bring to the examination ... all documents ... relevant to any matter in issue in the proceeding that are in his or her possession, control or power ..."

80 Also, during an examination, "where a person admits ... that he or she has possession, control or power over any other document that is relevant to a matter in issue in the proceeding ... the person shall produce it ...": see Rule 34.10(4).

81 If, during an examination, the person being examined improperly refuses to produce a relevant document, the examination may be adjourned to permit a motion for directions: see Rule 34.14(1)(d).

82 Rule 34.15(1) addresses certain situations, including the failure of a person "to produce a document ... that he or she is required to produce ..." But, the powers of the court in clauses (a), (b) and (c) do not contemplate an order to produce documents as a remedy. Clause (d), however, does allow the court to "make such other order as is just."

83 I am not fully satisfied that the production motion is technically permitted. In this case, it seems to me that the plaintiffs have one of three choices: (1) move to compel the production of a document listed in a notice of examination; (2) move to compel production of a document requested during a cross-examination; (3) move to require fulfillment of an undertaking, given on a cross-examination, to produce a document or documents. It is not open for the plaintiffs to move for the production of documents other than in those three situations.

84 The production motion was stayed before my dissatisfaction crystallized.

85 Counsel for Daniel argues that the production motion was brought "to delay the injunction motion from going ahead" and "the longer the motion for the injunction took to be argued, the more likely the issue would be moot." Although delay by the party who has an interlocutory injunction tucked safely in his pocket is usually advantageous to that party, the delay here did not have an ulterior origin. It is more likely that the production motion is the offspring of the procedural and documentary chaos that enveloped these proceedings in the early months of 2013.

17. The continuation of Richard's cross-examination

86 On April 16, 2013, Richard submitted to questioning as a continuation of his February 25th cross-examination.

18. The settlements

87 The production motion and the injunction motion came before me on April 22nd. The production motion was heard first and, after approximately one week of argument, it, effectively,

was settled (at least temporarily) because it was stayed. The injunction motion was not argued and was settled.

(a) *the order of May 6, 2013*

88 On May 6, 2013, Richard, Daniel and the plaintiffs signed minutes of settlement in respect of the motions (CSI did not join in the settlement at that time). I made an order on May 6th, only two paragraphs of which are relevant for the purposes of my current task. They are paragraphs 1 and 2:

> 1. THIS COURT ORDERS that Mr. Justice Ramsay's interim order dated January 22, 2013 ('the January 22nd interim order') shall continue as against Rick and Dan until the trial of this action, except that the following language shall be substituted for paragraph 5 of the January 22nd order:
>
> 5. THIS COURT ORDERS that Rick and Dan are prohibited from soliciting or servicing the present customers of the plaintiff Verge Insurance Brokers Limited ('Verge') and from interfering with Verge's contractual relations and economic interests and that Rick and Dan are prohibited from soliciting or inducing producers presently employed by Verge to leave Verge and to seek employment elsewhere in the insurance brokerage in Ontario.
>
> 2. THIS COURT ORDERS that the plaintiffs' motion to compel [that is to say, the production motion] as against Rick and Dan is stayed.

89 To permit easy comparison between paragraph 5 of the interim order of January 22, 2013 and its amended version in my order of May 6, 2013, I will set them out side by side:

The interim order of January 22, 2013	The order of May 6, 2013
5. THIS COURT FURTHER ORDERS that defendants, Richard Sherk, Daniel Sherk and CSI, are prohibited from soliciting or servicing Verge's present or former clients and from interfering with Verge's contractual relations and economic interests. *CSI is not prohibited from servicing Verge's former clients who have decided to go to CSI without having been solicited by the defendants, Richard Sherk, Daniel Sherk and CSI.*	5. THIS COURT ORDERS that Rick and Dan are prohibited from soliciting or servicing the present customers of the plaintiff Verge Insurance Brokers Limited ('Verge') and from interfering with Verge's contractual relations and economic interests and <u>that Rick and Dan are prohibited from soliciting or inducing producers presently employed by Verge to leave Verge and to seek employment elsewhere in the insurance brokerage in Ontario</u>.

90 The italicized sentence in the January 22nd order does not appear in the May 6th order. The underlined passage in the May 6th order is not found in the January 22nd order.

(b) *the order of August 1, 2013*

91 On June 28, 2013, CSI signed minutes of settlement with the plaintiffs regarding the production motion and the injunction motion. The minutes of settlement were embodied in an order that I signed at Welland on August 1, 2013, stating that the interim order of January 22, 2013 would continue as against CSI until trial subject to certain amendments. The amendments in paragraphs 1-4 were substantively slight. I will set out both the interim order of January 22nd and the August 1st order for comparison, with the amendments or changes in the latter underlined:

The interim order of January 22, 2013	The order of August 1, 2013
1. THIS COURT ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI Insurance Brokers Ltd. ('CSI'), deliver up any of Verge's confidential documents and information in the defendants' possession, power or control, including, but not limited to all confidential information.	1. THIS COURT ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI Insurance Brokers Ltd. ('CSI'), deliver up any of Verge's confidential documents and <u>confidential business</u> information in the defendants' possession, power or control, including, but not limited to all confidential information.
2. THIS COURT FURTHER ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI are prohibited from using, reproducing, selling, disseminating or otherwise disclosing documents and information belonging to Verge.	2. THIS COURT FURTHER ORDERS that the defendants, Richard Sherk, Daniel Sherk and CSI are prohibited from using, reproducing, selling, disseminating or otherwise disclosing <u>confidential</u> documents and confidential <u>business</u> information belonging to Verge.
3. THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel Sherk and CSI and their officers, directors, employees and agents to preserve all written communications between themselves, each other	3. THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel Sherk and CSI and their officers, directors, employees and agents to preserve all written communications between themselves, each other

and clients regarding the use of Verge's confidential information including e-mails and other electronic communications.	and clients regarding the use of Verge's confidential information including e-mails and other electronic communications.
4. THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel Sherk and CSI and their officers, directors, employees and agents requiring the defendants and their officers, directors, employees and agents to diarize all verbal communications they have had or may have in the future relating to the confidential information of Verge and dealings with Verge's clients.	4. THIS COURT FURTHER ORDERS the defendants, Richard Sherk, Daniel Sherk and CSI and their officers, directors, employees and agents requiring the defendants and their officers, directors, employees and agents to diarize all verbal communications they have had or may have in the future relating to the confidential <u>business</u> information of Verge and dealings with Verge's clients.

92 In paragraph 5, the amendments were more significant:

5. THIS COURT FURTHER ORDERS that defendants, Richard Sherk, Daniel Sherk and CSI, are prohibited from soliciting or servicing Verge's present or former clients and from interfering with Verge's contractual relations and economic interests. CSI is not prohibited from servicing Verge's former clients who have decided to go to CSI without having been solicited by the defendants, Richard Sherk, Daniel Sherk and CSI.	5. THIS COURT ORDERS that CSI shall not solicit or service present Verge clients <u>in the Niagara Region or in those areas forming part of the City of Hamilton which have the postal codes beginning with L8E, L8G, L8H, L8J, L8K, L8L, L8M, L8N, L8P, L8R, L8T, L8V, L8W, L9A, L9B and L9C as shown on the Hamilton Urban FSAs map attached hereto as Appendix 'A,' however, if a Verge client approaches CSI to handle their business without solicitation by CSI, CSI is free to do business with that client</u> ... ['solicitation' is then defined].

93 On behalf of CSI it is argued that paragraph 5 of the August 1st order, in contrast with paragraph (e) of Schedule "A" of the notice of motion in the injunction motion and paragraph 5 of the January 22nd order, "completely revamped the restriction placed on CSI." In other words, it is said that the order of August 1st differs substantially from what the plaintiffs sought in the injunction motion such that the August 1st order is closer to the position taken by CSI than that of the plaintiffs. I will repeat the three paragraphs:

Order sought in motion	January 22nd order	August 1st order
(e) an order prohibiting the defendants from soliciting or servicing Verge's present or former clients and prohibiting the defendants from interfering with Verge's contractual relations and economic interests;	(5) THIS COURT FURTHER ORDERS that defendants, Richard Sherk, Daniel Sherk and CSI, are prohibited from soliciting or servicing Verge's present or former clients and from interfering with Verge's contractual relations and economic interests. CSI is not prohibited from servicing Verge's former clients who have decided to go to CSI without having been solicited by the defendants, Richard Sherk, Daniel Sherk and CSI.	5. THIS COURT ORDERS that CSI shall not solicit or service present Verge clients in the Niagara Region or in those areas forming part of the City of Hamilton which have the postal codes beginning with L8E, L8G, L8H, L8J, L8K, L8L, L8M, L8N, L8P, L8R, L8T, L8V, L8W, L9A, L9B and L9C as shown on the Hamilton Urban FSAs map attached hereto as Appendix "A," however, if a Verge client approaches CSI to handle their business without solicitation by CSI, CSI is free to do business with that client . . . ['solicitation' is then defined].

94 The January 22nd order excludes non-solicited clients from the prohibition sought in the notice of motion. The August 1st order adds a geographical component. Overall, the changes are not sufficient to affect the issue of costs.

III SOME LEGAL PRINCIPLES

1. Statutory provisions regarding costs

(a) *jurisdiction*

95 The jurisdiction of this court to award costs is found in s. 131(1) of the C*ourts of Justice Act,* R.S.O. 1990, c. C.43:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

(b) *Rule 57.01(1)*

96 Rule 57.01(1) of the *Rules of Civil Procedure* lists some of the factors for the court to consider when exercising its jurisdiction under s. 131 of the *Courts of Justice Act*:

> 57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
>
> (i) any other matter relevant to the question of costs.

(c) *Rule 57.01(3)*

97 Rule 57.01(3) states:

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

(d) *Rule 57.01(4)*

98 Rule 57.01(4) reads:

> 57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
> (c) to award all or part of the costs on a substantial indemnity basis;
> (d) to award costs in an amount that represents full indemnity; or
> (e) to award costs to a party acting in person.

(e) *Rule 57.03(1)*

99 In accordance with Rule 57.03(1), the normal course is for costs on a contested motion to be fixed and payable within 30 days:

> 57.03(1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,
>
> (a) fix the costs of the motion and order them to be paid within 30 days; or
> b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.

2. Case law regarding costs generally

(a) *presumption that costs are to be fixed*

100 "[T]here 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": *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.) at para. 15.

101 "[I]f a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so": see *Boucher, supra,* at para. 16, citing *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 at 245 (C.A.).

(b) *overall sense of what is reasonable*

102 "An overall sense of what is reasonable may be factored in to determine the ultimate award [of costs]": see *Boucher, supra,* at para. 25, citing *Murano, supra,* at 249.

103 "[T]he objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding ...": see *Boucher, supra,* at para. 26.

104 "... a central controlling principle for the fixing of costs ... is to ascertain an amount that is a fair and reasonable sum to be paid by the unsuccessful litigant, rather than any exact measure of the actual costs to the successful litigant ...": see *Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004), 71 O.R. (3d) 263 (C.A.) at para. 97, leave to appeal to the Supreme Court of Canada dismissed January 27, 2005, [2004] S.C.C.A. No. 371.

105 The Court of Appeal in *Zesta Engineering Ltd. v. Cloutier,* [2002] O.J. No. 4495 at para. 4, made these statements in respect of fixing costs on an appeal (but I think that they are equally applicable to motions):[16] (Emphasis added)

> We have considered the bills of costs submitted by the appellant. However, we make no specific finding with respect to the amount of time spent or the rates charged by counsel. 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*.

(c) *fixing costs not simply a mechanical exercise*

106 "[T]he fixing of costs is not simply a mechanical exercise ... the fixing of costs does not begin and end with a calculation of hours times rates": see *Boucher, supra,* at para. 26.

(d) *expectation of the parties*

107 "In deciding what is fair and reasonable ... the expectation of the parties concerning the quantum of a costs award is a relevant factor": see *Boucher, supra,* at para. 37, citing *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 at 574 (S.C.J.).

(e) *preparation too perfect?*

108 "While it has often been accepted that the court should be reluctant to second-guess experienced counsel on the amount of time reasonably required for preparation, it has also been recognized that preparation time may reflect a standard of perfection and diligence for which an opposing party should not reasonably and fairly be required to pay": see *Farkas v. Sunnybrook & Women's College Health Sciences Centre*, [2005] O.J. No. 5798, 2005 CarswellOnt 10096 (S.C.J.) at para. 2.

109 I cannot see myself punishing the productive pursuit of perfection.

(f) *costs in other cases*

110 I find it generally unhelpful to try and create a range for costs by reference to other cases. There is never sufficient similarity in the facts. Litigation is not like baking a cake, where you mix together a defined list of ingredients and place them in an oven at a specific temperature for a fixed period of time.

(g) *time spent directly related to motion*

111 An award of costs on a motion should reflect time that was spent "directly related to the motion": see *Farkas, supra,* at para. 3.

112 This was a valuable legal principle for my purposes.

(h) *senior counsel performing routine services*

113 Where "[s]ome of the tasks performed by ... senior counsel ... were simple and otherwise of a routine nature such that clerical staff, or lawyers of less expertise ... could have properly performed them ... the costs awarded for them should be discounted ... from the rates he or she usually charges ...": see *Paletta v. Paletta*, [2003] O.J. No. 5197, 2003 CarswellOnt 5181 (S.C.J.) at para. 7.

114 I did not see any evidence of this practice.

(i) *costs in the cause to the loser?*

115 "[C]osts in the cause has the virtue that sometimes it is fair that a party should recover costs for an interlocutory motion - win or lose - if that party ultimately succeeds in the action": see *Smith (Estate) v. National Money Mart Co.,* (2008) 92 O.R. (3d) 224 (S.C.J.) at para. 13.

3. Case law specific to costs on injunction motions

(a) *unusual to award costs in interlocutory injunctions*

116 "... it would be unusual to award costs on an interlocutory motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the question of costs to the trial judge": see Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book), p. 2-91, cited with approval in numerous cases, including *Quizno's Canada Restaurant Corp. v. 1450987 Ontario Corp.*, [2009] O.J. No. 2563, 2009 CarswellOnt 3512 (S.C.J.), at para. 9.

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

(b) *where trial virtual certainty despite the interlocutory injunction*

118 In *Rogers Cable T.V. Ltd. v. 373041 Ontario Ltd.,* [1994] O.J. No. 1087 (Gen. Div.) it was said that, when considering the issue of costs, motions for an interlocutory injunction attract different considerations and regard must be had for whether the result of the injunction motion puts an end to the action. The court stated, at para. 4:

> Where it is clear that the granting of the interlocutory injunction will put an effective end to the proceedings it is appropriate for the court to make a costs order which reflects this fact and to fix the amount of costs. However, in a case such as this in which a trial is a virtual certainty[17] the court will consider the usual alternatives: plaintiff's costs in any event of the cause; plaintiff's costs in the cause; costs in the cause; or costs reserved to the trial judge.

119 In other words, a trial may place the allegations of the parties in a different light than the one illuminating the motions.

(c) *rule in Rogers Cable not mandatory*

120 Despite the rule in *Rogers Cable, supra,* the decision in *Intercontinental Forest Products S.A. v. Rugo,* 2004 CanLII 33353 (ON SCDC), at para. 3, speaks of a residual discretion in the motions judge to order costs payable forthwith:

> It is our view that the *Rogers Cable* decision does not establish a mandatory rule but that the residual discretion of the judge with respect to costs is preserved and that, in a particular case, the motions judge may determine to award costs on a motion for an interlocutory injunction payable forthwith, rather than reserving costs to the trial judge.

121 The court, at para. 4, points out that *Rogers Cable,* and those cases decided in the eight years thereafter, pre-dated the coming into force, on January 1, 2002, of Rule 57.03(1) and states, at para. 5:

> The new Rule by its terms applies to motions for an interlocutory injunction. The new Rule does not however, in our view, detract from the residual discretion of the motions judge in determining what costs order would be just. In making such a determination, the judge on a motion for an interlocutory injunction should consider the principles in *Rogers Cable* that, in the usual case where a trial is a virtual certainty, the award of costs should be reserved to the trial judge.

(d) *but sometimes costs are ordered payable forthwith*

122 In *Precision Fine Papers Inc. v. Durkin et al.,* 2008 CanLII 26690 (ON SC), following an argued motion, an injunction was granted to the plaintiff against James Durkin and his daughter, Wendy Durkin, and their new employer, the corporate defendant. Mr. Durkin was found to be a fiduciary and to have participated in the solicitation of customers of the plaintiff.

123 After granting the injunction sought by the plaintiff and without being able to say that a trial was a "virtual certainty" or "inevitable," the court, at para. 20, nevertheless, found it "appropriate to order costs payable forthwith" for these reasons:

> (a) I found that on the key issues, the plaintiff had not simply established a serious issue to be tried, but also a strong *prima facie* case; (b) the misconduct of the defendants was egregious - although described as an 'unpaid consultant,' Mr. Durkin was actively working behind the scenes, with his daughter Ms. Durkin, using confidential information and in breach of his fiduciary duties and in breach of his non-solicitation agreement, to solicit Precision's customers; (c) in order to expose the defendants' misconduct, which was disputed by the defendants every step of the way and on every possible ground, the plaintiff had to engage in lengthy and expensive investigations and litigation procedures; and (d) the plaintiff was substantially successful on the most important issues.

124 In *Grillo and Grillo & Associates v. D'Angelo et al.,* 2009 CanLII 2913 (ON SC), "the defendants, who were three associate lawyers and a paralegal with the plaintiff law firm, left the firm without notice on December 24, 2008, taking with them some two hundred and fifty of the firm's contingency fee files, leaving a note which was not discovered by Mr. Grillo, the principal of the firm, until December 29th. The defendants had contacted some of the clients of the firm before

their departure, and continued to do so immediately after they left, to obtain directions that the clients' files be transferred to the defendants' new firm": see para. 2.

125 An interlocutory injunction was granted to the plaintiff in *Grillo* and costs were ordered payable forthwith by the defendants. The court observed, at para. 9, "that at the hearing of this motion there was no serious effort made by the defendants to suggest that their conduct was proper."

4. Corporate defendant jointly and severally liable for costs?

126 In *Precision Fine Papers Inc., supra,* it was found that the corporate defendant (comparable to CSI, at bar) was aware that the individual defendants had obligations to their former employer (including a non-solicitation agreement) and knowingly benefited from their misconduct. The court held the corporate defendant jointly and severally liable for costs, along with the individual defendants, stating, at para. 37:

> ... Inter-World should be jointly and severally liable for the costs. Inter-World was aware of Mr. Durkin's non-solicitation agreement and ... Inter-World was aware of the Durkins' breach of duty and knowingly received the benefit of their misconduct. Inter-World should have taken steps to ensure that the Durkins complied with their obligations to their former employer. It was complicit in their breaches of duty and it should bear the full consequences.

5. Should court go behind settlements to ascertain merits?

127 Counsel for CSI argues that the court should not go behind the settlements negotiated with the plaintiffs to consider the merits of the factual allegations of the plaintiffs. Reliance is placed upon *O'Brien v. O'Brien*, [2009] O.J. No. 5019, 2009 CarswellOnt 7194 (S.C.J.), where the parties reached a settlement before trial but left the issue of costs to be determined by the court. At para. 8, the court stated:

> ... counsel for both parties wanted to argue the issue of entitlement to costs on the basis of the merits of their clients' respective positions with respect to the substantive issues had this matter proceeded to trial. In my view, it is not appropriate for me to decide the issue of costs as though the parties were arguing this case at trial ...

At para. 9, the court went on to say:

> ... the most important factor in determining both entitlement to and quantum of costs is the reasonableness and timeliness of the parties' respective settlement offers.

6. Substantial-indemnity costs are rare

128 "Solicitor-and-client costs [now known as substantial-indemnity costs][18] should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement": Orkin, *The Law of Costs,* 2nd ed. (Aurora: Canada Law Book, 1993) at p. 2-92, cited

with approval in a number of cases, including *Hunt v. TD Securities Inc.,* 2003 CanLII 3649 (ON CA), at para. 123.

129 Care must be taken not to award substantial-indemnity costs as a punishment for pre-litigation conduct that is "at the very heart of the proceedings and, as such, is compensable in damages." To do so is to award costs "twice for the same wrongdoing": see *Hunt v. TD Securities Inc., supra,* at para. 130. A similar sentiment was expressed in *Grillo, supra,* at para. 21, where partial-indemnity costs were awarded:

> While the conduct of the defendants at the time of their departure from the law firm and immediately thereafter may well attract censure, I have concluded that it would not be appropriate to award substantial indemnity costs to condemn that conduct because other remedies are available ... The actions of the defendants may ultimately result in an award of damages under several heads that would reflect the court's denunciation of their conduct. It seems to me that this issue is best addressed on a full evidentiary record, following trial.

130 In *Precision Fine Papers Inc., supra,* costs also were awarded on the partial-indemnity scale following the same reasoning.

IV DISCUSSION

1. The decision to settle

131 On behalf of the plaintiffs it is submitted that Richard, Daniel and CSI settled the injunction motion because "they saw the writing on the wall, re-evaluated their positions and sought the best possible outcome for themselves."

132 This suggested impetus for settlement may be a worthwhile working hypothesis for the plaintiffs, but I am not in a position to determine why the defendants settled the injunction motion (or agreed to a stay of the production motion). Litigants settle for a multitude of reasons, not all of which reflect an admission of fault or wrongdoing.

2. Proportionality

133 On behalf of Richard it is argued that the number of hours docketed by the lawyers representing the plaintiffs is excessive and "not a proportionate response" to the actions of Richard and Daniel. It is pointed out that: (1) the plaintiffs have approximately 22,000 insurance policies comprised of 4,000 commercial policies and 18,000 personal policies; (2) when Richard retired on April 3, 2012, his book of business consisted of 70 policies, mostly commercial, distributed among 30 customers, only one of which (Spectrum Healthcare) left Verge, but did so for its own internal needs; (3) when Daniel's employment was terminated, he was one of 17 producers, and his book of business consisted of 730 policies distributed among about 500 customers; (4) of the 500, only seven left Verge and followed Daniel to CSI (although the plaintiffs say that those seven customers translated into the loss of 20 policies); (5) the policies written by CSI for the seven customers amount to a decrease of .09% in Verge's total number of policies.

134 Citing the small number of clients who moved their accounts to CSI, counsel for Richard submits that "this meagre statistic alone refutes the plaintiffs' allegation that [Richard] had engaged in a conspiracy against Verge." The "meagre statistic" may refute the *success* of the conspiracy, but not necessarily the *fact* of the conspiracy.

135 CSI adds that "Verge has framed its injunction motion against the defendants as a necessary defensive step to repel an all-out attack by the defendants on its clients. To this end, Verge has expended hundreds of thousands of dollars in legal fees and disbursements. Yet, there were only a handful of clients who transferred their business to Verge and they signed letters indicating that they had not been solicited." It may be true that the direct financial damage to Verge, caused by the conduct of the defendants, will prove to be much less than initially feared. However, when the statement of claim was issued and while the motions were being prosecuted, it was prudent for Verge to assume the worst and it was reasonable for Verge to carry out the litigation-equivalent of carpet-bombing. I have no quarrel with such an approach. Litigation is nasty.

3. The valuation motivation

136 In a futile effort to keep the factual narrative as tidy as possible, I had hoped to avoid getting into the valuation issues (being the valuation date and the value of the Verge shares). But I must say something about them, because they have been raised by Richard as a possible motive for the action and the motions.

137 In paragraph 49 of the affidavit sworn by Richard on February 17, 2013, he deposes that the allegations being made against him by Mark make no sense and he describes a motive behind the allegations:

> 49. ... Before and since my retirement in early April 2102 I have wanted to sell my shares in Verge to ... Mark's holding company at fair market value in accordance with the valuation process in the Shareholder Agreement and the [Memorandum of Understanding]. If I had engaged in any of the improper, unethical or illegal business activities that Mark alleges I have been doing, I acknowledge that the results of those activities could materially and adversely affect Verge's gross revenue, net profit and ultimately the value of Mark's shares and my shares ... I believe that Mark has made these unfounded allegations against me in an effort to convince the third valuator and ultimately the judge who hears the valuation application that the value of my and his (Mark's) shares in Verge has markedly dropped. I believe that Mark's intention and strategy is to then offer less money and to ultimately pay less money for [my] shares in Verge ...

138 Therefore, Richard submits that the action proper and the two motions represent an effort by Mark "to gain a tactical advantage ... in connection with the valuation application."

139 Although these proceedings could have the effect of diminishing the value of Verge (after all, there might be customers who choose not to do business with a brokerage owned by a dysfunctional family who have become full-time litigants and, thus, must be part-time insurance producers), this is not the motive for the action or for the motions.

4. Will the action continue?

140 The amended statement of claim seeks 12 declaratory orders, an accounting, five different types of damages and only one item of injunctive relief. The plaintiffs ask for an injunction "to prevent the defendants from using the confidential information of Verge to solicit or service Verge's present or former clients and to prohibit the defendants from interfering with Verge's contractual relations and economic interests."

141 I think that the injunction-component of the action is spent (among other things, Daniel has resigned from CSI, Richard has surrendered his licence to sell insurance and the exodus of clients from Verge never materialized). Nevertheless, there are additional issues in the action that are highly probable to fuel a trial.[19]

142 It may be the case that the quick action of the plaintiffs has capped their financial loss at a relatively modest amount leaving, as the only issues to litigate, whether the defendants should be monetarily punished for their conduct by means of the various types of damages pleaded (and the counterclaim by Daniel for wrongful dismissal).

143 The importance of my finding that the injunction-component of the action has fizzled out is that it eliminates the common argument in favour of deferring, until trial, the determination of costs in an injunction motion.

5. Did CSI benefit from the wrongful conduct of Richard and Daniel?

144 Brenda French, the vice-president and co-owner of CSI, had provided consulting and training services for Verge in the period 2006-2009. In her cross-examination, on February 26, 2013, in answer to Q. 200, she conceded knowledge that Daniel had a fairly large volume of business:

> A. ... What I knew prior, when I had been working with Verge Insurance as a consultant, is that Dan was one of their more successful brokers, sales people. And I knew that he had a fairly large volume of business ...

145 Brenda French also knew that Daniel, upon his departure from Verge, was prohibited from soliciting or doing business with the clients in his former book of business.

146 In his affidavit sworn January 15, 2013, Mark deposes, at paragraph 15:

> ... approximately 10 clients (representing 25 insurance policies) have moved their business from Verge to Daniel's new employer, CSI ... These policies represent approximately $82,000.00 in lost annual commissions and contingent profit commissions.

147 At paragraph 16, Mark goes on to say:

> Verge has a solid record of retaining clients for approximately 10 years. Therefore, Verge's losses in respect of these clients over a 10-year period would be approximately $815,000 ...

148 In that same affidavit, Mark speaks of the need, in some instances, to reduce premiums "to retain the client's business" and to attempts by Daniel to solicit four other clients (whom he labels "files presently under attack") and concludes that over 10 years he expects the losses to Verge, from the wrongful conduct of Daniel, to be, in total, approximately 1.3 million dollars.

149 The allegations in this affidavit may be stale-dated because it seems now to be conceded by the plaintiffs that the number of clients who moved their business from Verge to CSI, because of Daniel, is seven: no more; no less. Presumably, this fact reduces the loss calculations.

150 The evidence in support of the monetary losses alleged by Verge is rough, but it was not the subject of any coherent opposition by, for example, Brenda French who, at Q. 438 of the transcript of her cross-examination, could do nothing more than say that Verge is "gaming the system."

151 On these motions, it is not necessary for me to calculate the benefit to CSI from the wrongful conduct of Daniel and Richard. This calculation will be left for trial. It is sufficient for me to find that there was a benefit and CSI would have known that there was a benefit. The existence, and knowledge, of this benefit favours treating CSI the same as Daniel and Richard for the purposes of fixing costs.

6. The "I-was-not-solicited" letters

152 A problem in the action for the plaintiffs is that CSI has produced letters from five of the seven clients who followed Daniel from Verge to CSI, all saying that they transferred their business unsolicited.[20]

153 The letters are attached as exhibits to the affidavit of Brenda French, sworn January 18, 2013. Three of the letters have identical wording:

> To Whom It May Concern
>
> Re: Placement of Insurance Business with CSI Niagara
>
> This letter will serve as a formal statement that our business was not enticed or solicited by Dan Sherk. At our initiative we have requested brokerage services from Dan Sherk, due to our longstanding association.

154 These letters were prepared by CSI staff.[21] Brenda French gave this evidence on her cross-examination:

> Q.490 So you had no knowledge of when these letters were going out or how they were created?
>
> A. I knew they were being put together and I knew that that was something we were doing, but I didn't know the specific content of each letter.

155 It will be observed that the three letters refer to "CSI Niagara." CSI has taken the position that its "trading territories" are Burlington and the Greater Toronto Area and, therefore, it does not compete with Verge, a company largely devoted to the Niagara Peninsula.[22] The plaintiffs argue that the reference to "CSI Niagara" is evidence that Daniel was intending to expand the trading territory of CSI into Niagara. When asked about this on her cross-examination, Brenda French testified:

> Q.483 So if there is no intention to move into Niagara and there is no CSI Niagara, why would someone in your office just put 'CSI Niagara' on a letter?
>
> A. Because they live there.
>
> Q.484 Who is 'they'?
>
> A. The account manager that does the processing of the paperwork.

156 I have heard some silly explanations in my years on the bench. This one deserves a coloured ribbon.

157 The "CSI Niagara" reference advances the conspiracy theory of the plaintiffs, which will play a prominent role in the trial. For my purposes, it does not affect the entitlement to, or the scale of, costs on the motions. It merely reinforces the notion that CSI should be equally liable for costs along with Richard and Daniel.

7. Did the defendants unnecessarily lengthen the motions?

158 The plaintiffs contend that Richard, Daniel and CSI "engaged in conduct which unnecessarily lengthened the [motions] and resulted in additional time and expense," including: (1) the adjournment of the January 22, 2013 injunction motion; (2) the refusal to produce relevant documents; and, (3) their denials of wrongdoing.

159 This impugned conduct appears to be the primary justification for the plaintiffs demanding that costs be fixed, payable now and calculated on the substantial-indemnity scale.

(a) *the adjournment*

160 I have already mentioned that the plaintiffs are critical of the fact that Daniel sought an adjournment of the injunction motion on January 22, 2013. Adjourning a motion on the first return date is not uncommon. The injunction motion involved a substantial amount of material which had been served earlier in the month. It is not surprising that Daniel wanted an adjournment. I certainly do not think that the adjournment merits judicial punishment.

161 As early as November 8, 2012, counsel for the plaintiffs had advised all of the defendants that Verge "will be bringing a motion for injunctive relief" since "it is now evident that CSI and Daniel Sherk are using a client list to systematically solicit Verge's clients for the purpose of transferring business to CSI ..." However, this does not mean that the defendants should have been prepared to argue the injunction motion on January 22nd. Being warned about a motion is not the same as being served with a motion.

162 In a related complaint, the plaintiffs further say that the defendants "refused to engage in any meaningful discussions" regarding the terms being suggested by the plaintiffs for the adjournment.

163 The plaintiffs were proposing that, in consideration for the adjournment, the defendants consent to an interim injunction in accordance with the terms found in Schedule "A" to the notice of motion. In other words, the plaintiffs sought complete capitulation in return for the adjournment; apparently, any talk of less would not be "meaningful discussions" in the eyes of the plaintiffs.

164 The fact that Ramsay J. granted an interim injunction largely on the terms contained in the notice of motion does not render the requested adjournment, or the failure to settle the motion, deserving of criticism.

165 Earlier in these Reasons, I traced the communications among counsel in respect of the adjournment and the terms being suggested for the adjournment. I do not find any fault with the conduct of the defendants in this regard.

(b) *refusal to produce relevant documents - Richard and Daniel*

166 It is a fact that the production issues delayed this matter, added to the time and expense involved in the litigation and, of course, generated the production motion.

167 The plaintiffs argue that Richard and Daniel failed to produce relevant documents when cross-examined on their affidavits on February 25, 2013. This complaint is found in the initial written submissions of the plaintiffs, at paragraphs 20-29, which I shall excerpt.

168 First, the types of productions requested are identified:

> 19. ... Richard and Daniel were cross-examined on their affidavits on February 25, 2013.
> 20. In the course of the cross-examinations, counsel for the plaintiffs asked Richard and Daniel to produce documents it deemed to be relevant on the [injunction] motion. The documents requested included but were not limited to: (1) communications between the defendants between the summer of 2011 to the present; (2) Richard's and Daniel's communications with Verge's clients following their departures from Verge; (3) contracts of employment/services between CSI and Richard and Daniel; and (4) marketing efforts by CSI and/or Richard and Daniel to the Niagara insurance market.
> 21. Amongst these requests, the plaintiffs were particularly concerned about the defendants' communication with one another, as one of the primary allegations advanced against the defendants is that they were working together from the summer of 2011 onwards to transform CSI into a competitor of Verge in commercial insurance. On the plaintiffs' theory of the case, the defendants were achieving this objective by using Richard's knowhow and relationship with insurance markets and Daniel's relationship with Verge's commercial clients.

169 Next, the response to the request for this documentation is described, including the New Productions supplied by Richard:

> 22. Daniel's counsel refused all requests for documents ... made by the plaintiffs in the course of his cross-examination ... not a single document was ... produced. Daniel refused to provide any of his communications with the other defendants on the basis that the plaintiffs' request was too broad ...
> 23. Although Richard initially refused to produce any of the communications between himself and the other defendants ... he reconsidered this refusal and provided approximately 50 pages worth of e-mails and text messages on April 8, 2013, which were highly redacted and incomplete (... "the New Productions") ...

170 There were efforts to conduct further cross-examinations of Richard and Daniel in respect of the New Productions:

> 24. Upon receipt of the New Productions, the plaintiffs sought to cross-examine Richard and Daniel. A notice of examination was served on Richard which contained a list of documents that both were expected to bring to the cross-examination.[23] The plaintiffs specifically requested that Richard bring all unredacted copies of the New Productions to the examination.
>
> 25. Daniel refused to attend the cross-examination[24] ... While Richard attended the cross-examination, he refused to bring unredacted copies of the New Productions or disclose the full extent of his communications with the other defendants on the

basis of relevancy. His counsel also refused on the basis that full documentary disclosure would not be provided until discoveries.

171 I pause here to offer the view that it is no defence to a request for production of 71levant documentation on a cross-examination to say that the material will be supplied on examinations for discovery.

172 The refusals referred to in paragraph 25 of the written submissions prompted the production motion:

> 26. As a result of Richard's and Daniel's refusal to produce the documents requested, the plaintiffs were forced to bring a motion for production [the production motion] to be heard before the injunction motion ... [The production motion] consumed a week of the court's time and involved a litany of materials including the plaintiffs' motion record, factum, book of authorities and numerous aids to arguments that were drafted and compiled throughout the course of the week.
> 27. The costs of the production motion were truly borne by the plaintiffs. Neither Richard nor Daniel put together a responding record for the motion. Although counsel for Richard did draft a factum in response to the motion, much of the response was saved for oral argument.
> 28. The production motion could have been avoided had Richard and Daniel disclosed the requested documents during their first cross-examination ...
> 29. There is little doubt that the New Productions provided by Richard on April 8th were clearly relevant. They showed that Richard was making important decisions for CSI, was meeting with clients and was actively seeking to grow CSI's commercial brokerage together with Daniel. These productions unravelled the defendants' case, showing that all three parties, CSI, Daniel and Richard, were involved in a conspiracy to harm the plaintiffs and destroy a family business.

173 It is beyond useful debate to deny that the New Productions were damaging to the defendants.

174 And, finally, the plaintiffs pose this theory in their written submissions:

> 30. It would appear that Richard and Daniel's sudden willingness to resolve the injunction motion on the terms requested by the plaintiffs was influenced by the likelihood of production of their secret e-mails. They knew what existed in e-mail or text form but did not want to disclose it. In this regard, the production motion played a pivotal role in the proceedings.

I do not have sufficient information upon which to agree or disagree with the accuracy of this theory.

175 Richard relies upon the wording of paragraph 3 of the order of Ramsay J. which required the defendants "to preserve all written communications between themselves ... regarding the use of Verge's confidential information ..." Richard seizes on the word "preserve" and it is submitted on his behalf that "preserve" does not mean "produce." I agree with that submission, but it does not affect the overriding obligation to produce all documentation relevant to the issues raised by the injunction motion. The January 22nd order in no way limited that obligation.

176 On the February 25th cross-examination of Richard, he was asked by plaintiffs' counsel to produce copies of *all* electronic communications. On its face, such a request is overly broad. It was reasonable for Richard's counsel to have refused until he had an opportunity to review the preserved e-mails and text messages and to vet them for relevance.

(c) *refusal to produce relevant documents - CSI*

177 The plaintiffs also complain about the lack of documentary disclosure made by CSI, contending that CSI denied to the plaintiffs "the relevant documents in advance of the injunction motion" and thereby "CSI engaged in tactics which resulted in wasted judicial time and resources."

178 When Brenda French was cross-examined on February 26, 2013, she was asked to produce the e-mail correspondence between her and the other defendants and with Andree Senn (a former senior executive with Verge). Counsel for CSI refused, at p. 30:

> COUNSEL: And I am going to refuse production at this stage. Production will happen in the discovery context, and the test for discovery will apply at that time. I am going to refuse production for purposes of today's cross-examination. It is a cross-examination on an affidavit.

And later, at p. 31:

> COUNSEL: ... going ... back to Justice Ramsay's order, there is no requirement for production. There is just the requirement for preservation ...

179 Once again, the "preserve" versus "produce/deliver up" confusion surfaces. It will be remembered that paragraph 1 of the January 22nd order required the defendants to "deliver up" certain documentation, whereas paragraph 3 obligated the defendants to "preserve" all written communications. The preservation order did not replace or dilute the duty of the defendants to produce or to deliver up documents relevant to the motion.

180 CSI was advised, by letter dated April 10, 2013, that the plaintiffs would be seeking the requested documents on the return of the production motion.

181 CSI did not take the position that the documents requested by the plaintiffs were irrelevant, only that they would be produced as part of the discovery process. That is an untenable position. All documents relevant to the motion must be produced. Relevance is defined by the motion or by the affidavit upon which cross-examination takes place (whichever is the broader).

182 The plaintiffs argue that the production motion "played a pivotal role in the proceedings" as the "fear of what may be disclosed" in the productions sought is the reason why "CSI then entered into settlement discussions." This argument, like the one made in respect of Richard and Daniel, is only speculation.

(d) *denials of wrongdoing - Richard and Daniel*

183 Wrongdoing that is the subject-matter of the action itself should not be used to bolster a claim for costs on a motion.

184 The court must be cautious regarding allegations of wrongdoing for another reason: defendants are entitled to require plaintiffs to prove their case; defendants are not obliged to assist

plaintiffs with that proof. Nevertheless, defendants must not mislead plaintiffs and defendants must comply with the *Rules of Civil Procedure*, in particular as to documentary production and disclosure.

185 Did the defendants engage in wrongdoing relevant to the issue of costs?

186 In their affidavits, Richard and Daniel deny all allegations of wrongdoing. Yet, some allegations turned out to be true based upon the evidence that came to light after their affidavits were sworn, in particular, the New Productions.

187 In the injunction motion record, the plaintiffs allege "that Richard breached his fiduciary duties to Verge, as a shareholder, director and officer by taking Verge's confidential information and business processes and using it to the benefit of CSI for the purpose of setting up a commercial insurance department at CSI to solicit Verge's clients." In making these allegations, the plaintiffs rely upon e-mails between Richard and Brenda French (a co-owner of CSI) which reveal that they had been communicating with each other since June of 2011. The plaintiffs further rely upon evidence from a private investigator, Glenn D'Ostillo, who allegedly overheard Brenda French, in a conversation with Daniel, say that Richard would be a sub-contractor with CSI.

188 In response to these allegations, Richard maintains that he was acting as a coach or mentor to CSI and that Mark was aware he was doing so. At paragraph 35 of his affidavit of February 17, 2013, Richard deposes, in part: (Emphasis added)

> I describe what I did as *coaching or mentoring*. Mark was fully aware of my coaching activity and he never questioned or opposed it during the 15 or more years that I did it before my retirement in early April 2012 . . . I regard my occasional visits and telephone conversations with Ms. French to be more recent examples of coaching that I had done with broker owners.

189 At paragraph 43 of his February 17th affidavit, Richard states that he had no desire to remain in the insurance industry following his retirement from Verge on April 3, 2012.[25] And, in an affidavit sworn the next day, on February 18th, Richard stated, at paragraph 11:

> I repeat that I have no intention of creating a second [CSI] office in the Niagara Region.

190 However, the New Productions contain an e-mail on October 2, 2012, from Richard to Andree Senn, at 7:14 p.m., saying:

> We are going to have to be careful of [e-mails] between CSI and me. Remember my g-mail account.

191 If Richard believed there was nothing wrong in his dealings with CSI or that he was merely "coaching or mentoring," would there be a need to send this e-mail or to seek secrecy?

192 There also is an e-mail on October 4, 2012, at 9:35 a.m., from Richard to one Mike McDonald, an insurance-industry contact: (Emphasis added)

> [Daniel] and I like everything you do and want to work at strengthening and expanding the relationship for our mutual benefit. Another thing to bring up is

> that *we are actively looking for a commercial producer who lives in the Hamilton area and might be interested in changing brokerages* for a better financial relationship. If you or Kevin might know of anyone please let [Daniel] or I know as we want to actively grow the brokerage.

193 This e-mail seems to show that Richard, as alleged by the plaintiffs, "was working behind the scenes with CSI in an attempt to grow [CSI]." (It is worth remembering that Richard still was a 50% shareholder in, and director and fiduciary of, Verge.)

194 Furthermore, while insisting that he had not done anything wrong, "Richard admitted, during cross-examination, that he advised CSI on such things as: how to organize a brokerage for growth staffing, removing financial barriers to selling commercial insurance, training salespersons, budgeting and dealing with insurers or the markets. Richard also maintained that there was nothing wrong with him recommending Daniel and Andree Senn to work for CSI when he knew that both individuals could play an instrumental role in turning CSI into a commercial brokerage with the resources to compete with Verge in the Niagara insurance market."

195 The suggestion by Richard that he was providing "coaching or mentoring" is utter nonsense. Richard is not the Johnny Appleseed of the Southern Ontario insurance industry, as he would have us believe.

196 Regarding Daniel, in the injunction motion the plaintiffs allege that he "took Verge's client list and was using this information to wrongfully solicit clients to transfer their business from Verge to CSI." Several employees of Verge swore affidavits to the effect that "the client renewal lists were missing from Daniel's office immediately following his termination." Daniel denies taking any confidential information and insists that he did not solicit the clients of Verge - they came to him unsolicited. There also are the "I-was-not-solicited" letters.

197 On these motions, I am unable to ascertain whether Daniel took client lists when his employment was terminated. A trial is needed to dispose of that issue with any confidence.

198 During his cross-examination, Daniel was asked to produce a contract of employment or service between himself and CSI (or a draft thereof). He denied the existence of a contract. Yet, in the course of answering an undertaking from its cross-examination, CSI produced a Letter of Intent dated October 15, 2012 between Daniel and CSI. On October 17th, Daniel and Brenda French signed the Letter of Intent, outlining "in broad terms the future employment arrangements between Dan Sherk and CSI Brokers & Financial Services [formerly Cal Shultz Insurance Brokers Ltd.]." By its terms, an employment contract was to be drafted "within 30 days."

199 And then there is an undated e-mail from an unknown person (believed to be Brenda French) to Richard:

> Hi Rick ... Here are 3 contracts to work from ... first attachment is the Co-Broker Agreement we [gave] to both you and Dan back in early May ...

200 There is merit in the submission that Daniel and Richard were not "open and honest with the court in their evidence," having denied facts that have proved to be correct.

(e) *denials of wrongdoing - CSI*

201 The plaintiffs argue that, "at all times, [Brenda French] the vice-president of CSI (who served as the main deponent on the motions) denied any wrongdoing. However, the documents disclosed in the course of the production motion showed clear wrongdoing on her part, which included assisting Richard and Daniel to breach their ongoing obligations to Verge."

202 The plaintiffs further contend that of the three defendants against which the injunction was sought, Brenda French was the most insistent in her denials of wrongdoing.

203 The principle allegation made against CSI is that it "induced and assisted Richard and Daniel in breaching their ongoing duties to Verge, namely using the resources of Richard as a statutory director and shareholder of Verge to set up a commercial insurance department at CSI ... through the use of Verge's confidential information."

204 At paragraph 59 of her February 26, 2013 affidavit, Brenda French swore that Richard "has acted as a 'friendly coach' similar to our other industry contacts." I have already expressed my view of this coaching/mentoring defence.

205 An example of the active involvement by Richard in the business of CSI and his efforts to assist CSI in competing against Verge can be seen in an e-mail from Brenda French to Richard on October 29, 2012 regarding a meeting with a potential client:

> Meeting confirmed ... can't talk today, will meet you at clients, we can talk while on the road to get our dog & pony show[26] in order. Thanks for your help.

This e-mail betrays a level of involvement by Richard in the business of CSI that is well beyond coaching or mentoring.

206 There also is an e-mail on November 2, 2013 from Maureen Holbrook, an account manager at CSI, to Richard:

> Hi Rick. Here is the proposal for MPS Micropaint. Insured's name is Philippe Bourbonniere.

207 And there is a further e-mail, this one dated November 16th, from Brenda French to Maureen Holbrook, Richard and Andree Senn (former vice-president of operations at Verge), discussing a Broker of Record (BOR) form[27] that was sent regarding one of Verge's policies:

> Hi Maureen. I wanted to let you know that the BOR has been forwarded to Intact and now Verge has their 10 days.

208 When questioned about whether she and Richard ever had a conversation with Daniel or Richard about "the possibility of Richard joining CSI at any point," she replied, "That is ridiculous." However, we have the e-mail of October 4, 2013, that I mentioned earlier, from Richard to an insurance-industry contact. I will set it out again, in part: (Emphasis added)

> *... we are actively looking for a commercial producer who lives in the Hamilton area and might be interested in changing brokerages* for a better financial relationship. If you or Kevin might know of anyone please let [Daniel] or I know as we want to actively grow the brokerage.

209 Finally, there is the affidavit evidence of Glenn D'Ostillo, a private investigator who was conducting surveillance for the plaintiffs on November 21, 2012. During a luncheon meeting between Brenda French and Daniel, he overheard and noted that Ms. French advised Daniel that Richard "will be considered a sub-contractor, two days per week."

(f) *conclusion*

210 The matter of the adjournment does not have an impact on costs.

211 Having earlier reviewed the chain of communications in respect of the documentary disclosure, I think that the blame for the chaos surrounding this issue rests on all parties: the plaintiffs misinterpreted the order of January 22nd; the scheduling of cross-examinations was rushed; the demands for documentary disclosure made by the plaintiffs were dumped on the defendants at the last minute; and, the defendants did not correctly distinguish their disclosure obligations on a cross-examination from those on an examination for discovery.

212 The communications among the parties have been recounted above in minute detail for the period January-April 2013. All in all, the conduct of the defendants does not affect the issue of entitlement to costs and is not sufficiently serious to increase the scale of costs.

213 As I understand it, the purpose for the wrongdoing-lengthened-the-proceedings argument of the plaintiffs is threefold: to justify fixing costs now; to warrant the substantial-indemnity scale; and, to render CSI jointly and severally liable for those costs. Unfortunately for me, it was not until I had journeyed deep into these Reasons that I realized this argument would not have a bearing on my decision. I have decided to fix and award costs now based upon the results achieved on the motions and upon the fact that, in my opinion, the injunction-component of the action, effectively, is spent; and, I have rejected a finding of joint-and-several liability on the simple ground of fairness.

8. Request for source documents leads to some reductions

214 Counsel for Richard submitted that, if this court were inclined to award and fix costs against Richard (and I was), he would like "all source documents that relate to and/or support the amounts claimed in the Costs Outline for the two motions" to be produced and he requested the opportunity thereafter to make additional submissions. This was a reasonable request. Payor parties are not obliged to blindly accept the hours and totals in a bill of costs (although it prolonged an already painfully long process and added three sets of written submissions to the 12 then in hand).

215 Counsel for Richard served a magnificent, colour-coded booklet of submissions in which he sliced, diced and, in a couple of instances, puréed, the fees claimed by counsel for the plaintiffs. He argued that Richard should not be required to pay costs connected to the following services recorded in the dockets that were provided: (a) the statement of claim and its subsequent amendments; (b) the Demand for Particulars served on behalf of Richard; (c) a discussion to remove Richard as a director of Verge; (d) a summons to witness served on Richard and a motion to stay; (e) the cross-examinations of the other defendants; (f) a pension issue; (g) the counterclaim; (h) the attendance of both counsel for the plaintiffs on the cross-examinations of Richard; and, (i) the general duplication of lawyerly effort on behalf of the various lawyers in the law firm representing the plaintiffs.

216 I will review each of these nine points.

(a) *the statement of claim and its subsequent amendments*

217 The statement of claim is a complex, detailed document. It was amended (once I had thought but now twice I am told) and, as I mentioned long, long ago in these Reasons, it is 31 pages in length. Counsel for the plaintiffs defend its inclusion in the bill of costs for the injunction motion by saying, "Verge could not have commenced the injunction proceedings without issuing a statement of claim ... this was part and parcel of the injunction process." I do not agree. The statement of claim, initially or as amended, cannot be viewed as directly related to the injunction motion. The costs associated with the statement of claim are costs of the action.

218 There are 15 docket entries dealing with the statement of claim and the actual amount billed to the plaintiffs for them is $26,609.00. Conservatively stated, the partial-indemnity scale of costs is approximately 60% of the actual rate charged to a client (and this happens to be the percentage that counsel for Richard has suggested). This produces a figure of $15,965.00 which should be deducted from the partial-indemnity costs of the plaintiffs as not being the responsibility of any of the defendants in respect of the motions.

(b) *the Demand for Particulars served on behalf of Richard*

219 After service of the statement of claim, counsel for Richard delivered a Demand for Particulars. Counsel for the plaintiffs reviewed that demand and provided a response. Counsel for Richard also served a Request to Inspect Documents to which counsel for the plaintiffs responded.[28]

220 There are six docket entries for these matters. They are not directly related to the motions. The actual rate charged to the plaintiffs for them is $1,539.00. This produces a partial-indemnity amount of $923.00 which should be deducted from the partial-indemnity costs of the plaintiffs as not being the responsibility of any of the defendants in connection with the motion.

(c) *a discussion to remove Richard as a director of Verge*

221 The dockets reveal one entry in respect of a discussion with Mark about removing Richard as a director of Verge. That discussion is not directly related to the motions. It was billed to the plaintiffs for $187.00 which, on the partial-indemnity scale, is $112.00 and should be deducted from the partial-indemnity costs of the plaintiffs.[29]

(d) *a summons to witness served on Richard and a motion to stay*

222 On January 7, 2013, counsel for the plaintiffs served a summons to witness upon Richard, in respect of the injunction motion, requiring him to attend for "examination-out-of-court as witness before hearing" on January 15th. The summons was a nullity because it is reserved for non-parties: see Rule 34.04(4) of the *Rules of Civil Procedure.* Richard moved to quash or to stay the summons and, on January 15th, counsel for the plaintiffs agreed not to proceed with the summons and, in return, counsel for Richard consented to withdraw the motion without costs.

223 Consequently, the services rendered in respect of this aspect of the case should be excluded from the costs claimed by the plaintiffs.

224 Around the same time, Richard brought his motion under Rule 15.02 (which I described previously) for which Ramsay J. ordered costs on January 22nd. Services provided in conjunction with January 22nd should also be excluded from the costs now being claimed.

225 Combined, these matters seem to occupy four entries in the dockets. The actual amount billed to the plaintiffs was $7,937.00. Therefore, the partial-indemnity figure is $4,762.00 and it should be deducted from the partial-indemnity costs.

(e) *the cross-examinations of the other defendants*

226 Counsel for Richard went to considerable effort to separate the services in connection with the cross-examinations of Richard on his affidavits and those services rendered in the preparation for, and attendance at, the cross-examinations of the other defendants, arguing that the latter should not be included in any costs payable by Richard.

227 However, counsel for the plaintiffs advance a sensible and persuasive opposing argument, which I accept. It is to be remembered that the allegations on the injunction motion (and in the action) are that Richard, Daniel and CSI conspired to compete with Verge. Thus, as those defendants are said to be co-conspirators, the cross-examinations of Daniel and CSI are relevant to the case against Richard (similarly, the cross-examinations of Richard and CSI are relevant to the allegations against Daniel and the cross-examinations of Daniel and Richard are relevant to the claims against CSI).

228 The result is that all cross-examinations have generated one pot of costs, not three.

(f) *a pension issue*

229 Richard has a pension plan with Verge and an issue arose (unrelated to the two motions) which required legal services. A docket entry for May 9, 2013 must be disallowed as it concerns the pension. The actual charge to the plaintiffs is $3,750.00 or $2,250.00 at the partial-indemnity rate, the latter of which shall be deducted from the partial-indemnity costs.

(g) *the counterclaim*

230 There is an entry in the dockets on June 18, 2013 for a number of services, including "review counterclaim" with an actual charge to the plaintiffs of $541.00 (partial-indemnity - $324.00). The only counterclaim at the time was one by Daniel and it did not apply to the motions. Because the actual charge is not particularized and relates only in part to the counterclaim, I will arbitrarily allow half of the $324.00 or $162.00 and the other half must be excluded.[30]

(h) *the attendance of two counsel on cross-examinations of Richard*

231 It is argued that the two motions were not overly complex and that it was unnecessary for both counsel representing the plaintiffs to attend on each cross-examination of Richard.

232 As I have now reached paragraph [232] of these Reasons, I am unsympathetic to the argument that the motions were "not overly complex." At some point in a case, the volume of materials generated, the layer upon layer of issues raised and "the ongoing and changing nature of the circumstances" (in the words of counsel for the plaintiffs) mean that the sheer mass of the matter creates its own complexity. Two counsel for the plaintiffs are needed to follow the bouncing ball.[31] Richard, Daniel and CSI each had their own counsel who worked together, in tag-team fashion, defending the motions. Even with two counsel for the plaintiffs, they were outnumbered three to two.[32]

(i) *the general duplication of lawyerly effort*

233 Counsel for Richard submits that there was a "general duplication of lawyerly effort on behalf of the various lawyers in the law firm representing the plaintiffs." I think otherwise. There was no over-lawyering here. The seven lawyers working on this file for the plaintiffs ranged in experience from two years to 28 years. In my opinion, all of the services were rendered by the lawyer with the appropriate experience.

(j) *conclusion*

234 The result of all of this is that the sums in paragraphs (a)-(d), (f) and (g) above, which total $24,174.00, shall be deducted from the partial-indemnity costs of the plaintiffs ("the source-documents deduction").

235 Although it could be said that I have just engaged in the line-by-line analysis typical when assessing costs, but not appropriate when fixing them, the dollars involved justify the effort.

9. The February 4th court attendance - a further reduction

236 I also exclude, from the costs liability of the defendants, the attendance before Ramsay J. on February 4th, to settle the form and content of the January 22nd order. This was a "win" for the defendants (Richard and Daniel, at least, and even if it was not a "win" for the defendants, it is not something for which the plaintiffs should receive costs) and the associated services rendered on behalf of the plaintiffs should not be recoverable by them. From what I can see, there are eight docket entries pertaining to the February 4th court attendance. The actual fees charged to the plaintiffs are $9,040.00, which means that the partial-indemnity portion is $5,424.00. Accordingly, I shall deduct the sum of $5,424.00 from the partial-indemnity costs of by the plaintiffs ("the February 4th deduction").

10. Rule 57.01(1) factors

237 Rule 57.01(1) of the *Rules of Civil Procedure* lists a number of factors that a court may consider when dealing with costs, the most important of which, in almost every instance, are the result in the proceeding and the existence of any written offer to settle.

238 Ours is a result-oriented legal system. Here, the plaintiffs obtained, in very large measure, the injunction that they were seeking. The injunction motion, although settled, was a "win" for the plaintiffs.

239 With the production motion being stayed, it was not a "win" for anyone. I would regard the result there as a "draw."

240 There were no written offers to settle or settlement proposals sufficiently identifiable to warrant consideration.

241 I will now begin the ritualistic review of the remaining factors in Rule 57.01(1).

242 I have no difficulty in concluding that the rates charged by the lawyers representing the plaintiffs were reasonable, the hours spent were necessary (subject to the source-documents deduction and the February 4th deduction) and the division of labour among those lawyers was appropriate: see Rule 57.01(1)(0.a).

243 Rule 57.01(1)(0.b) speaks of "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed." I confess that I have never found this factor to be of much assistance. How helpful can it be to use, as a guide, the expectation of someone whose judgment is so flawed that he or she was unable to correctly gauge the outcome of the proceeding? Also, the level of expertise and industriousness among members of the litigation bar varies wildly. Who does the unsuccessful party have in mind when forming his or her expectation? And, is the expectation of the unsuccessful party to be determined when the motion is served? When it is argued? At some point in between? Here, I expect that no one could have anticipated, when the injunction motion was served, that it would unfold as it did. Yet, as the months passed, anyone paying attention would have known that the tab was escalating rapidly.

244 Counsel for the plaintiffs were required to do much more preparation for the motions than were counsel for the defendants, as would be expected. The defendants had the luxury of mounting a focused and selective defence. They, not the plaintiffs, knew what they had done and what there was to find.

245 Rule 57.01(1)(a) is not applicable at bar, being "the amount claimed and the amount recovered."

246 Rule 57.01(1)(b) deals with ″the apportionment of liability." On behalf of Richard, it is submitted that, if costs are to be awarded, they should be apportioned among the three responding parties, with each being liable for one-third. I agree. I see no rational basis for determining that one of the defendants is more or less at fault than the others. Richard, Daniel and CSI participated in a corporate *ménage à trois* and I am unable to distinguish, in any meaningful way, their respective liability for costs. However, if I were to hold them jointly and severally liable for costs, as argued by the plaintiffs, it would mean that an individual defendant could, in the end, become liable to pay a large percentage, or perhaps all, of those costs. Such an outcome would not be fair. Consequently, I think that the liability of each of the defendants should be capped and I choose to do this by ordering that Richard, Daniel and CSI each shall be responsible for one-third of the costs that I intend to order.

247 The motions were factually complex (Rule 57.01(1)(c)) and of high importance to all parties (Rule 57.01(1)(d)). To the extent that the conduct of the defendants lengthened the proceedings (and it probably did not), this affected the amount and nature of the services rendered on behalf of the plaintiffs and, therefore, this fact is somewhat reflected in their bill of costs (Rule 57.01(1)(e)).

248 I do not know whether the February 4th deduction properly falls under Rule 57.01(1)(e) ("the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding"), Rule 57.01(1)(f) ("whether any step in the proceeding was (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution") or Rule 57.01(1)(i) ("any other matter relevant to costs").

249 Richard complains that "there was unnecessary duplication of materials" in the many volumes filed on the motions by the plaintiffs such that the photocopying costs of $5,200.00 "should be substantially reduced." No. It is a matter of general convenience for the motions judge that each volume be a stand-alone product.

250 Although fixing costs is not merely an arithmetic exercise of multiplying hours worked by hourly rates, it is a good starting point. Once the docket-based costs have been calculated, I proceed

to a consideration of overall reasonableness and to the factors in Rule 57.01(1). A court should not depart from the docket-based costs unless presented with a sound basis for doing so. In an era when the quality of advocacy is inconsistent, those counsel who prepare carefully and argue thoroughly should not suffer judicial tinkering with their bill of costs. If the docket-based costs survive the test of reasonableness and the scrutiny of Rule 57.01(1), why should they not be allowed as claimed?

11. Ability to pay costs

251 It is argued on behalf of Richard that the costs order sought by the plaintiffs "would compromise his financial ability to defend the ... action and to prosecute the valuation application."

252 There is insufficient evidence to support this argument. I would require, from Richard and his wife, a sworn list of their assets, debts and living expenses (in other words, something similar to a Financial Statement (Form 13.1) in a family law proceeding). However, even if such evidence were available, in commercial litigation, I do not consider the ability to pay costs to be terribly relevant when fixing costs.

12. Quantum

253 Both motions were prosecuted with the thoroughness that I would expect in litigation of this type and the defendants, in particular Richard, mounted a spirited and comprehensive attack on the quantum of costs claimed.

254 Having read the boxes of materials filed on the motions, I (although resentful) think that I am in a good position to consider the submissions of counsel and to determine the reasonableness of the services rendered and the associated fees and disbursements.

255 The costs requested by the plaintiffs were broken down by their counsel in this fashion (the actual costs are shown for comparative purposes only - they are not being claimed):

	Part.-indemnity costs	Subst.-indemnity costs	Actual costs
Production motion fees	30,154.50	45,198.75	60,517.00
HST on fees	684.09	962.03	1,301.63
Disb. with HST	915.34	915.34	915.34
Total	31,753.93	47,076.12	62,733.97
Injunction motion fees	192,682.50	286,306.00	395,702.50
HST on fees	25,048.73	37,219.78	51,441.33
Disb. with HST	21,489.31	21,489.31	21,489.31
Total	239,220.54	345,015.09	468,633.14
GRAND TOTAL	$270,974.47[33]	$392,091.21	$531,367.11

[Editor's note: Note[33] is included in the image above.]

256 As I have said, the plaintiffs should be seen as having succeeded with their injunction motion. It is my view that, with the matter of the injunction unlikely to go to trial, the plaintiffs are entitled to partial-indemnity costs for the injunction motion. There is no basis for an award of costs on the substantial-indemnity scale.

257 However, the partial-indemnity fees for the injunction motion, as set out in the above table ($192,682.50), are calculated at only 49% of the actual amount billed to the plaintiffs ($395,702.50). If, instead, I were to allow the plaintiffs 60% this would produce an additional $44,739.00 in fees for a total of $237,421.50.[34] Bearing in mind that the primary argument for the

plaintiffs is that they should be awarded their costs on the substantial-indemnity scale, my function is not simply to choose one scale or the other but to fix a fair figure using the appropriate scale.

258 I think the starting point for that fair figure should be $237,421.00 (exclusive of HST and disbursements). From that amount I will apply the source-documents deduction of $24,174.00 and the February 4th deduction of $5,424.00. The result is that the allowable fees are $207,823.00 with HST of $27,016.99 for a total (exclusive of disbursements) of $234,839.99.

259 As for disbursements on the injunction motion, they are set out in the above table at $21,489.31. However, counsel for the plaintiffs recently reduced that figure by $1,091.72. The disbursements now total $20,397.59.

260 Thus, the total partial-indemnity costs to which the plaintiffs are entitled are $255,237.58 ($234,839.99 + $20,397.59) which I shall round down to $255,237.00.

261 The production motion was stayed and, therefore, was a "draw" for which neither side should receive costs.

V CONCLUSION

262 Without intending to detract from the detail and the circumstances set out in these Reasons, I will, for convenience, summarize my fundamental findings:

1. The injunction motion was a "win" for the plaintiffs.
2. In my opinion, the injunction-component of the action is spent. There is nothing meaningful left to litigate in respect of that form of relief.
3. Therefore, the plaintiffs are entitled to their costs of the injunction motion, but on the partial-indemnity scale (there being no basis to award a higher scale).
4. Those costs shall be reduced by the source-documents deduction and by the February 4th deduction.
5. The production motion was stayed. This is a "draw" for all of the parties. There shall be no costs of that motion (at least at this time; should the motion be revived, costs will also be revived).
6. The total costs to which the plaintiffs are entitled, net of the deductions that I have just mentioned, and inclusive of HST and disbursements, are $255,237.00.
7. Richard, Daniel and CSI shall each be responsible for one-third of those costs.

263 Accordingly, I order that each of Richard, Daniel and CSI pay costs to the plaintiffs in the sum of $85,079.00, all-inclusive, and they shall do so on or before January 25, 2014. I will entertain a motion by the plaintiffs, on notice, to strike the pleadings of any defendant by whom costs are unpaid by that date.

264 Finally, I have never had the opportunity to hear argument on costs in respect of costs. I look forward to being advised that counsel are unable to reach agreement on the matter and I will set a timetable for written submissions. I am confident that, with a little effort, we can emulate, in a litigation context, the circular flight of the Wampus Bird.[35]

J.W. QUINN J.

1 In total, the plaintiffs filed 17 volumes of materials consisting of numerous affidavits (by 11 or more different affiants). The defendants delivered five affidavits. Cross-examinations on the affidavits took place over a period of two weeks. Extensive facta were prepared for the motions (the factum of the plaintiffs on the injunction motion alone exceeded 70 pages in length). The materials and supplementary materials of the plaintiffs surpassed 1,000 pages. Prosaically put, the filings by all of the parties filled nine bankers' boxes. Hearing these motions was as much an aerobic challenge as it was an intellectual experience.

2 With a whiff of singed reputation.

3 Including one which I was unaware even existed: the tort of "intrusion on seclusion" (which sounds like something devised by J.D. Salinger).

4 The issues raised in the amended statement of claim would occupy a third-year law class for an entire semester.

5 The statement of defence of Richard has 69 paragraphs and the reply of the plaintiffs runs to 34 paragraphs. Knowledge of the nuts and bolts of these pleadings (and those of the other defendants) is unnecessary to an understanding of the costs issues now before the court.

6 The practice in St. Catharines is that long motions are returnable "the week of" and, as that date approaches, the trial co-ordinator advises counsel of the actual hearing date (which, in this instance, was January 22, 2013).

7 E-mails and text messages have become a joyous source of evidence for judges. Sometimes they supply a minute-by-minute account of communications without the meddlesome interference of reflection and sober second thought that could not be avoided in the pre-cyberspace era.

8 Counsel for the defendants complain that they were not consulted in the selection of this date. I do not see the inflexible need to do so. Consulting multiple counsel is time-consuming and frequently unfulfilling; which is why we have adjournments. One of the counsel said, in a letter, "I expect you to comply with Rule 37.10 and consult with me as to the ... timing [of] your motion." Rule 37.10 does not require a moving party to consult with a responding party in respect of the return date for a motion. It deals with the obligation to confer or attempt to confer on whether a motion, already on a list, will be proceeding, in which case a Confirmation of Motion (Form 37B) must be filed.

9 For the very few who may not recollect the distinction between an interim injunction and an interlocutory injunction, the latter is in force until trial (when the rights of the parties are finally determined) and the former is usually granted for a brief period of time pending the interlocutory injunction.

10 Later, it will be seen that, on February 4, 2013, Ramsay J. added a sentence to paragraph 6.

11 This is a preposterous demand and ignores the exigencies of running a law practice.

12 On behalf of the plaintiffs it was submitted that "without a signed, issued and entered order, Justice Ramsay's endorsement is without legal effect." Not so. The operative part of the endorsement is the order. The formal order is merely packaging.

13 I checked. They are the same.

14 Is this sarcasm? A threat? A *mea culpa*?

15 Up to this point, counsel for the plaintiffs had been referring to these documents as "the New Productions."

16 The decisions in *Stellarbridge Management Inc.* and *Zesta Engineering Ltd.* were in the context of the costs grid which was revoked as of July 1, 2005.

17 I assume that the court means it is the injunction issue (and not other issues in the action) for which "a trial is a virtual certainty."

18 Effective January 1, 2002, "solicitor-and-client costs" were replaced by "substantial-indemnity costs."

19 Only death or bankruptcy will prevent these parties from going to trial about something.

20 The five clients are: R.A.G. Rentals Limited; Euro Motors Limited; Mold-Spec Inc.; ICT Power Company Inc.; and, Multiurethanes.

21 However, from its distinctive wording, I expect that the letter from Multiurethanes was created by the client.

22 Approximately 42% of the customers of the plaintiffs are in the St. Catharines area, 10% are in and around Stoney Creek, 40% are in other parts of the Niagara Peninsula and 8% exist elsewhere in Ontario.

23 Only if the New Productions were provided as part of an undertaking given by Richard during his initial cross-examination, would he be required to respond to this Notice of Examination (although, rather than ignore the notice, it would have been necessary for him to move to set it aside).

24 The New Productions came from Richard not Daniel. Therefore, in my opinion, Daniel was not obliged to respond to the Notice of Examination (although, again, rather than ignore the notice, the proper course is to move to set it aside).

25 But, it was not until one year later, on April 1, 2013, that Richard relinquished his licence to sell insurance in Ontario.

26 Readers will have noticed the term "producer" elsewhere in these Reasons. Apparently, "salesperson" is too plebeian or, perhaps, pejorative, for the insurance industry. Yet, the "dog & pony show" reference is evidence that "producer" makes a lot of sense, as selling insurance seems to be a theatrical performance. Is there any business, anywhere, that does not disparagingly view the buying public as dimwits?

27 Doug Homeniuk, when cross-examined on his affidavit on March 7, 2013, in answer to Qs. 13-18 said this about BOR forms: "Well, a broker of record form allows the insured to choose his insurance broker ... they can sign a broker of record form to transfer the authority for that account to the new broker ... In anticipation of a broker leaving an office, they can go to all their customers and have them pre-signed, ready to go, after the fact ... 'sign her, I'm going to a new broker. Sign this form and I can deal with you at my new office,' transcends the rule of the non-compete clause."

28 I made the decision, in the beginning, not to refer to any of the counsel in this case by name so as to reduce the number of names already in use and to lessen the likelihood of inadvertent transpositions. Bad decision. It has yielded a tedious result.

29 Although this amount comes under the rubric *de minimis non curat lex*, I must not be cavalier with the money of others.

30 More *de minimis*.

31 Those two counsel had 24-year and four-year pedigrees, respectively; a nice, sensible balance of experience for co-counsel.

32 Not only is it reasonable for the plaintiffs to have co-counsel, I should have a co-judge.

33 The bill of costs of the plaintiffs shows this total as $276,934.47. But, my addition of the various subtotals produces $270,974.47.

34 As a matter of interest, the substantial-indemnity fees for the injunction motion are 72% of the actual fees.

35 A bird that Christie Blatchford insists exists in mythology: see *National Post*, December 14, 2013, at p. A8.

SCHEDULE B

SCHEDULE B
RELEVANT STATUTES

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

Costs

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

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

Discretion of Court

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

Factors in Discretion

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

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

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

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

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

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

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

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

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

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

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

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

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

Contested Motion

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

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

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

SCHEDULE C

SCHEDULE C
WEST FACE'S OFFER TO SETTLE THE CALLIDUS ALLEGATIONS

See attached.

From:	Milne-Smith, Matthew
To:	"Rocco DiPucchio"; Andrew Winton
Cc:	"Robert.Centa@paliareroland.com"; "jeff.mitchell@dentons.com"; "andy.pushalik@dentons.com"; Carlson, Andrew; kris.borg-olivier@paliareroland.com
Subject:	RE: Griffin Affidavit
Date:	March 13, 2015 2:21:36 PM

Rocco,

As indicated in my email below, the record is in the process of being served and filed as we speak. We look forward to this matter being resolved by the Court.

Yours very truly,

Matt

From: Rocco DiPucchio [mailto:rdipucchio@counsel-toronto.com]
Sent: March 13, 2015 2:12 PM
To: Milne-Smith, Matthew; Andrew Winton
Cc: 'Robert.Centa@paliareroland.com'; 'jeff.mitchell@dentons.com'; 'andy.pushalik@dentons.com'; Carlson, Andrew; kris.borg-olivier@paliareroland.com
Subject: Re: Griffin Affidavit

Matt,

With respect, you have now sent several emails repeating the same tiresome allegations. If you want to file the record despite our reasonable suggestions on the proper way forward, then do so. I'm quite confident that the court will see behind your protestations that the filing of this kind of affidavit, given your client's obvious self-interest and it's conduct to date, are nothing more than feeble excuses. Indeed, your repeated references to the media in each of your emails only reinforces my opinion that this move is part of a calculated strategy to harm Callidus through the media by filing publicly. This is especially so given that your client repeatedly refused to disclose it's research on Callidus to us when we requested it. Instead, you invited our client to launch a proceeding. It's now clear why your client wanted that to happen.

At this stage, let's let the court decide what conduct speaks volumes.

Sent from my Samsung Galaxy smartphone.

-------- Original message --------
From: "Milne-Smith, Matthew" <MMilne-Smith@dwpv.com>
Date:03-13-2015 1:50 PM (GMT-05:00)
To: Andrew Winton <awinton@counsel-toronto.com>, Rocco DiPucchio <rdipucchio@counsel-toronto.com>
Cc: '"Robert.Centa@paliareroland.com"' <Robert.Centa@paliareroland.com>, '"jeff.mitchell@dentons.com"' <jeff.mitchell@dentons.com>, '"andy.pushalik@dentons.com"' <andy.pushalik@dentons.com>, "Carlson, Andrew" <acarlson@dwpv.com>, kris.borg-olivier@paliareroland.com

Subject: RE: Griffin Affidavit

With Prejudice

Andrew,

Thank you for your email. West Face denies that Mr. Griffin's affidavit contains any material misstatements of fact about Callidus.

As we have previously advised you, the affidavit responds to (among other things) Catalyst's erroneous allegation that West Face's Callidus research relied upon confidential information improperly disclosed by Brandon Moyse. West Face has refuted your client's allegations by detailing the impetus for its research, and the public sources from which the research was derived. West Face is not aware of any inaccuracy in any of the information obtained from those public sources. We note in that regard that your client has refused to particularize any alleged misstatement of facts in the affidavit, despite my request that you do so.

Furthermore, I am not aware of any basis on which the test for a sealing order under *Sierra Club of Canada v. Canada (Minister of Finance)* could be met. There can be no compelling public interest in confidentiality over Mr. Griffin's affidavit, particularly where: (a) articles appeared in the *Globe and Mail* and *National Post* shortly after your client's filings, quoting from those filings and repeating the allegations to which Mr. Griffin is responding; (b) West Face's research on Callidus, as explained in Mr. Griffin's affidavit, is based entirely on public sources; (c) Catalyst has reserved the right to file reply materials publicly even if West Face files its materials under seal; and (d) while Catalyst has made unspecified allegations that the Callidus response is inaccurate, you have proposed that the Griffin affidavit in its entirety be sealed. In the circumstances, we are in the process of serving West Face's Responding Motion Record under separate cover and will be filing it with the Court in due course.

With respect to your intention to send Mr. Griffin's affidavit to the OSC, we disagree that the OSC has any jurisdiction over materials delivered in Court proceedings such as these. West Face has responded by affidavit to a series of broad and sweeping allegations of misconduct made against it. We do not expect the OSC to have any interest in materials filed in the course of civil litigation, but would be more than pleased to discuss Callidus with them should the OSC so desire.

Yours very truly,

Matt

From: Andrew Winton [mailto:awinton@counsel-toronto.com]
Sent: March 12, 2015 4:57 PM
To: Milne-Smith, Matthew; Rocco DiPucchio
Cc: 'Robert.Centa@paliareroland.com'; 'jeff.mitchell@dentons.com'; 'andy.pushalik@dentons.com'; Carlson, Andrew
Subject: RE: Griffin Affidavit [IWOV-CLIENT.FID45653]

Matt,

Just to clarify one thing in my previous message: the suggestion that West Face can file the Griffin

affidavit under seal and Catalyst will file its reply under seal is a suggestion, not a firm offer. To the extent the email below suggests otherwise, I mis-stated Catalyst's position.

If filing under seal is of interest to your client, let me know and I'll confirm our instructions.

Regards,

Andrew

Andrew Winton
Lax O'Sullivan Scott Lisus LLP

Direct: (416) 644-5342

From: Andrew Winton
Sent: March-12-15 3:05 PM
To: 'Milne-Smith, Matthew'; Rocco DiPucchio
Cc: 'Robert.Centa@paliareroland.com'; 'jeff.mitchell@dentons.com'; 'andy.pushalik@dentons.com'; 'Carlson, Andrew'
Subject: RE: Griffin Affidavit [IWOV-CLIENT.FID45653]

With Prejudice

Matt,

As we just discussed, Catalyst does not accept the offer below.

Catalyst's position is that the Griffin's affidavit contains material misstatements of fact about Callidus. If West Face proceeds to file the Griffin affidavit in the public record, Catalyst will be sending a copy of the affidavit to the OSC to deal with that matter.

I am not in a position to tell you what those misstatements are, and my client is not interested in presenting its reply position to West Face before West Face files its responding record. Catalyst tried to the out-of-court route with West Face in January when it expressed its concerns about West Face's research via correspondence. Those attempts to resolve the matter without resort to the courts were repeatedly rebuffed. It's now too late to turn the clock back.

If West Face agrees to keep the Griffin affidavit out of the public record by agreeing to a sealing order over that affidavit, then Catalyst will agree to seal its reply to that affidavit. Otherwise, West Face will have to deal with whatever consequences arise from filing the affidavit publicly.

Regards,

Andrew

Andrew Winton
Lax O'Sullivan Scott Lisus LLP

Direct: (416) 644-5342

From: Milne-Smith, Matthew [mailto:MMilne-Smith@dwpv.com]
Sent: March-09-15 2:38 PM
To: Rocco DiPucchio
Cc: Andrew Winton; 'Robert.Centa@paliareroland.com'; jeff.mitchell@dentons.com; andy.pushalik@dentons.com; Carlson, Andrew
Subject: RE: Griffin Affidavit

With Prejudice

Rocco,

Thank you for your reply. With respect, we fail to see how responding to a specific allegation made by Catalyst could constitute an "improper and collateral purpose". Your client alleged in its Notice of Motion, and again in Mr. Riley's affidavit, that "Moyse had confidential information pertaining to Callidus on his personal computer that he shared with West Face and which West Face used to prepare its research report." To rebut that allegation, West Face must disclose its research and the provenance of same, to demonstrate that it is derived entirely from public sources. That is what Mr. Griffin's affidavit has done. Were West Face to have simply made a bald denial, I have no doubt that you would have noted that the denial had little or no probative value without demonstrating the contents of the research and how it had been conducted independent of Mr. Moyse.

It is also surprising that your client would accuse West Face of improperly using Court filings to disseminate negative information about Catalyst, given that negative articles about West Face appeared in the *Globe & Mail* and the *National Post* shortly after your client's most recent filings. To the extent that the press has an interest in this matter, it has not been on the basis of anything my client has done.

If your client does not want West Face's Callidus research to be filed in response to the allegations Catalyst has made, Catalyst must forthwith (1) discontinue its Notice of Motion insofar as it relates to Callidus; (2) redact from the Court file any and all allegations relating to Callidus; and (3) pay West Face its costs forthwith, on a substantial indemnity basis, in the amount of $25,000. As you can see from Mr. Griffin's affidavit, West Face has gone to great lengths to demonstrate that there is no merit to any of Catalyst's speculative assertions about Callidus, the AWS-3 auction, or WIND Mobile. So long as the motion persists as filed, however, our client is compelled to respond and will do so in the ordinary course. Having made allegations of misconduct against West Face, it does not lie in your client's mouth to try and restrict the Court from a full record responding to the same.

While we see no merit to your client's attempt to control the Court record, we will defer filing West

Face's Responding Motion Record until Wednesday at 10:00 a.m. so that you may obtain instructions in respect of the foregoing.

Yours very truly,

MMS

dwpv

Matthew Milne-Smith | Bio

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DAVIES WARD PHILLIPS & VINEBERG LLP

From: Rocco DiPucchio [mailto:rdipucchio@counsel-toronto.com]
Sent: March 9, 2015 9:36 AM
To: Milne-Smith, Matthew
Cc: Andrew Winton
Subject: Re: Griffin Affidavit

Matt,

I acknowledge receipt of the Griffin affidavit.

Having reviewed the affidavit, it appears to me that much of it has been sworn for an improper and collateral purpose. Specifically, the affidavit describes in great detail your client's "thesis" on Callidus, repeating several times the false allegation that Callidus' loan portfolio is a cause for concern. It appears that these sections of the affidavit have been included solely to harm Callidus' business in an attempt to further your client's short strategy through a public court filing. Those sections have absolutely little or no relevance to the allegations in the motion, and should be struck out.

I would request that you take steps to ensure that this material is not filed with the court until we have had an opportunity to bring a motion to strike the offending portions of the Griffin affidavit, or to seek other relief in relation to them.

In the event that you proceed to file this material notwithstanding my request, we will rely upon this conduct as further evidence of West Face's malicious conduct in this matter.

Sent from my Samsung Galaxy smartphone.

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto.

COSTS SUBMISSIONS OF THE RESPONDING PARTY WEST FACE CAPITAL INC.

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Toronto ON M5V 3J7

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Lawyers for the Defendants
West Face Capital Inc.