IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Smith v. Michelin North America (Canada) Inc., 2008 NSSC 66

Date: 20080310
Docket: SH 248992
Registry: Halifax

Between:

Everett Smith

Applicant

- and -

Michelin North America (Canada) Inc.

Respondent

COSTS DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: By written submissions: last written submissions January 15, 2008

Written Decision: March 10, 2008

Counsel: **Paul G. Vogel**, **Iain D. Sneddon**, and **Ronald A. Pink, Q.C.,** for the Applicant
Brett Ledger and **Peter McLellan, Q.C.**, for the Respondent

By the Court:

[1] In a decision released October 30, 2007, I concluded the application of Everett Smith to have Michelin pay $268 million into the Michelin pension fund should be dismissed. The parties now address the issue of costs.

ISSUES

1. Should both parties have their costs on a solicitor/client basis paid from the pension fund?
2. Alternatively, should they be paid on a party/party basis and, if so, on the basis of Tariff A or C?
3. In the further alternative, should only the successful party, Michelin, be entitled to its costs? Should they be paid from *a)* the pension fund or *b)* by the applicant personally?

FACTS WITH RESPECT TO COSTS

[2] Each party spent substantial sums and retained experts to present their cases. Each had experienced local counsel from Halifax and counsel from Ontario experienced in pension litigation.

[3] The applicant's Bill of Costs presented with its submissions on costs is $943,522.33, inclusive of all disbursements. The respondent's invoices for legal fees are attached to the affidavit of Janet Kennedy, the Director of Personnel Group Services for Michelin. With disbursements, they total $1,216,560.37.

POSITIONS OF THE PARTIES

[4] The applicant says his costs and those of Michelin should be paid from the Michelin Pension Plan on a solicitor/client basis or a party/party basis. Alternatively, if he is not to be awarded his costs, the applicant submits that Michelin's costs on a party/party basis should be paid from the pension plan. In the further alternative, if the applicant is to pay Michelin's costs personally, he submits they should not be in such an amount as to be a penalty to the applicant.

[5] Michelin says it should have its costs of the hearing since it was entirely successful and costs should not be paid from the pension plan. He says they should be based on Tariff A; if on Tariff C, an additional lump sum award should be made or a lump sum in lieu of tariff costs.

[6] Michelin was unsuccessful in its interlocutory application to have the originating notice (application inter partes) converted to an originating notice (action) but costs were awarded in the cause. The applicant says Michelin should have its costs of that application heard over one and a half days only in the amount of $3,000.00. The costs of that application are included in the invoices for Michelin's counsels' fees.

COSTS GENERALLY

[7] *Rule 63.03(1)* provides that costs follow the event unless the court orders otherwise:

63.03.

(1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.

[8] The applicant was appointed as a representative of all members, member spouses and beneficiaries having an interest in the Michelin Pension Plan by order of Kennedy, C.J. on July 6, 2006. The order was made pursuant to *Civil Procedure Rule 5.10(1)*:

Representation of interested persons who cannot be ascertained, etc.,

5.10.

(1) In a proceeding concerning

(a) the administration of the estate of a deceased person,

(b) property subject to a trust;

(c) the construction of a written instrument, including an enactment;

the court may appoint one or more persons to represent any person, including any unborn or unascertained person, or the members of a class of persons who have a present, future, contingent, or unascertained interest in, or who may be affected by the proceeding, and who, or some of whom, cannot be readily ascertained or found.

[9] The applicant relies upon *Rule 63.12.* and *63.24.* which provide as follows:

Costs of trustee, personal representative, or mortgagee

63.12.

(1) Where a person is a party in the capacity of trustee, personal representative or mortgagee, he shall, unless the court otherwise orders, be entitled to costs, insofar as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative, or out of the mortgaged property.

Costs payable out of trust funds

63.24.

Costs payable out of or chargeable against any trust estate, trust fund or mortgaged property, shall not be so paid as against any person interested therein, unless

(a) the costs have been taxed;

(b) any interested person is sui juries and has consented to the payment; or

(c) the court has fixed the amount of, and directed the payment or charge.

[10] Costs are of course in the discretion of the court. In *White v. Halifax (Regional Municipality) Pension Committee* NSCA 2007 22, 2007 CarswellNS 68, the court said in para. 101:

> 101 ... Costs are within the discretion of the court and each case must be assessed in light of its particular circumstances and the relevant considerations weighed and balanced.

[11] The normal rule is that the successful party is entitled to its costs. The applicant says that, in a case like this, the normal rule should be departed from. In cases involving the administration of trust funds, like the Michelin Pension Fund, he says it is appropriate to award costs from the fund where the issue is one of administration or interpretation of the trust and the matters are not adversarial. He refers to *Civil Procedure Rules 63.12* and *63.24* (quoted above) in this regard.

[12] Michelin says there is no reason in this case to depart from the usual rule and that *Civil Procedure Rules 63.12 and 63.24* are not applicable in this case. The applicant says those Rules support its submission that it should have its costs on a solicitor/client basis. However, in my view, he does not fall within the categories listed in *Rule 63.12.* Although the words “personal representative” are used in the first line, the context for that phrase is made clear in the last two lines. There it

refers to “the fund held by ... the personal representative.” There is no such fund in this case held by the representative and he is clearly not a trustee or mortgagee either. The *Rule* is therefore not applicable. Nor, accordingly, is *Rule 63.24.*

[13] The applicant was appointed to represent all members, member spouses and beneficiaries of the pension plan pursuant to *Civil Procedure Rule 5.10*. There is nothing in that *Rule* which authorizes a departure from the usual rule with respect to payment of costs.

CASE AUTHORITIES

[14] *Re Buckton*, [1907] 2 Ch. 406 is a decision of the English Court of Chancery in 1907. It has been cited in many cases of this nature and continues to be relied upon. In that case, Kekewich, J. divided trusts in estate cases into three categories at pp. 414-15:

> In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. ...

> There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
>
> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the cost of all whom he has brought before the Court.

[15] Many courts since have grappled with trying to put the case before them into one of these categories. In *White*, *supra*, the Nova Scotia Court of Appeal dealt with the issue. In paras. 92 and 93 the court said:

> 92 The appellants request a costs order that is extraordinary in two respects. They ask for costs even though completely unsuccessful both at trial and on appeal. This is a departure from the general rule that costs follow the event.

> They also ask for costs on a solicitor and client basis out of the pension fund. This is a departure from the general practice of awarding costs on the lower, party and party scale. In support of this extraordinary request, the appellants make two principal submissions.
>
> 93 First, they claim that their action fits within a line of cases in which costs of interpreting the provisions of a will, trust or pension plan have been ordered paid out of the fund. They say that, given there was a *bona fide* dispute about the interpretation of the plan, it would have been appropriate for the respondents to seek the directions of the court in which case the costs would have been paid out of the fund.

[16] The Court of Appeal in paras. 96 to 98 referred to *Re Buckton,* continuing in para. 99:

> 99 A line of pension fund cases has followed and expanded the *Re Buckton* principles. ...

The court said in para. 100 that the *Re Buckton* principles do not always require that costs be paid from the estate. The court said in that paragraph:

> 100 ... The case indicates that where, in an adversarial proceeding, beneficiaries make claims adverse to other beneficiaries, the unsuccessful party generally ought to bear the costs of those whom they take to Court.

[17] The court in *White, supra*, then gave four reasons why the costs should not be paid from the pension fund (paras. 102-05). The court said "This was no friendly court application" to interpret the plan. There were allegations of breach

of statutory and fiduciary duties and claims for damages. Secondly, the court said there was "little if any benefit for the administration of the plan generally" from resolving the claims. Furthermore, the benefits claimed would have been at the expense of other plan members. Finally, the court said "The merits... were weak." (para. 105). All in all, the court concluded in para. 106: "It would not be either fair or just" to pay the costs from the pension fund.

[18] In *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2007 ONCA 605, 2007 CarswellOnt 5511, Gillese, J.A. considered the *Re Buckton* approach to costs. She said that it has been relied upon in other jurisdictions (para. 7) but said she preferred the approach of Cullity J. in *Sutherland v. Hudson's Bay Co. Ltd.*, [2006] O.J. No. 2009 (S.C.J.). She quoted in para. 6 from the decision of Cullity J. at para. 11 as follows:

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settler who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have advanced for the benefit of all of the persons beneficially interested in the trust fund.

[19] In para. 8, Gillese, J.A. said:

> 8 ... I do not find the categories set out in *Buckton* to be particularly helpful in the pension trust context.

[20] She said of Cullity, J.'s pension trust approach in para. 13.

> 13 ... unless a court proceeding fits within one of those two categories, the ususal civil litigation costs rules ought to apply.

[21] She considered how the application of the pension trust approach to costs applied to the case before her. She said in para. 19:

> 19 Whether litigation is adversarial or directed at the due administration of a trust is critical in deciding whether to order costs from the trust fund because, where the matters in issue are truly administrative, there is no unfairness in ordering costs from the pension fund. Costs in those circumstances are a legitimate expense of ensuring that the fund is properly administered.

[22] I agree with Gillese, J.A.'s assessment of what the crucial issue is in determining how costs should be awarded. I conclude that I must decide if the litigation was adversarial or a matter of administering the pension fund.

CHARACTER OF THE APPLICATION

[23] The parties dispute the nature of the proceeding. The applicant says it was to determine if Michelin was entitled to take contribution holidays, an issue involving the administration or interpretation of the pension plan. The applicant says that at all times it acknowledged that Michelin followed the advice of its actuaries when it took contribution holidays. Michelin says it was a contractual matter, with the applicant alleging Michelin had failed in its contractual duty to contribute to the plan, having breached its fiduciary obligations and having in effect appropriated trust funds by taking contribution holidays. Michelin says this was an adversarial proceeding with a huge amount of money at stake. Michelin also says that, if the costs are paid from the pension fund, it is essentially paying them since it is the only party now permitted or required to contribute to the plan.

[24] Michelin also refers to what it calls the applicant's "shotgun" approach, having raised issues clearly not suitable, it says, to an application but to an originating notice (action). When Michelin applied to change the originating notice (application inter partes) to an originating notice (action), the applicant withdrew those issues but only after Michelin had spent time and effort preparing to deal with them.

[25] Various case authorities have considered what distinguishes an adversarial proceeding from one where the real issue is the administration or interpretation of a pension plan. I have already mentioned *White*. In that case, the court concluded there was ample reason not to pay the costs from the pension fund: the claim included a damage claim; there were allegations of reprehensible conduct; the case was weak and the benefits claimed would be at the expense of other plan members and beneficiaries. The main reason the court in *White* distinguished its situation from those in the first two categories of *Re Buckton* was "... this was no friendly court application for the interpretation of an obscure provision in the plan." (para. 102). The issue in this case, unlike that in *White*, did not involve claims adverse to other beneficiaries. The question for me is whether that is sufficient to distinguish it in its costs result from *White*. In *White*, if the applicants had been successful, there would have been an adverse effect upon other members of the pension plan, not upon the pension committee itself, leaving aside the issue of damages claimed. In this case, if the applicant had been successful, Michelin would have had to pay $268 million into the pension fund. That clearly would not have caused an adverse effect upon plan members, but it is impossible to say that the effect upon Michelin would not have been adverse.

[26] In other cases cited to me, there was no similar adverse effect which would have been the result of a successful application, that is, the unsuccessful party having to pay a large sum into the pension fund.

[27] In *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan* (5) (1997), 149 D.L.R. (4th) 200 (N.S.C.A.), 1997 CarswellNS 246, the issue was entitlement to an actual surplus on windup of a pension plan. In *Reevie v. Montreal Trust Co. of Canada* (1984), 46 O.R. (2d) 667 (H.C.J.), 1984 CarswellOnt 103, the pension plan had been terminated and the issue was entitlement to distribution of a plan surplus. *Sulpetro Ltd. Retirement Plan Fund v. Sulpetro Ltd.* (1990), 66 D.L.R. (4th) (Alta. C.A.), 1990 CarswellAlta 37 was a surplus distribution case as well. *C.A.S.A.W. Local 1 v. Alcan Smelters & Chemicals Ltd.* (2001), 198 D.L.R. (4th) 504 (B.C.C.A.), 2001 CarswellBC 887 dealt with how pensionable earnings were to be calculated. *Burke* v. *Hudson's Bay Co.* (2003), 37 C.C.P.B. 14 (Ont. C.A.) 2003 CarswellOnt 3142, an appeal decision, dealt on appeal only with administrative costs and expenses, but the motions court decision, not provided, dealt with a broader range of issues, many of which were sent on for trial. *A.T.A. v. Calgary Board of Education*, 2006 ABQB 171 (Q.B.), 2006 CarswellAlta 359 dealt with excess funds which had been paid

into a long term disability insurance plan. The decisions in *Patrick v. Telus Communications Inc.* (2005), 49 B.C.L.R. (4th) 75 (C.A.), 2005 CarswellBC 2882 and *Patrick v. Telus Communications Inc.* (2006), 54 C.C.P.B. 70 (B.C.S.C.) 2006 CarswellBC 2154 both dealt with the employer's attempt to modify a pension plan to eliminate "consent pensions" in future.

[28] In *C.U.P.E. - C.L.C.,, Local 1000 v. Ontario Hydro,* [1989], O.J. No. 679, 68 O.R. (2d) 620 (C.A.), no reasoning was given for the award of costs and, therefore, there was no discussion about whether the nature of the proceeding was the reason for the award. In that case, it was the employer who was unsuccessful and both parties were awarded solicitor/client costs from the pension fund.

[29] In *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 1994 CarswellAlta 138, there were two issues: entitlement to surplus and contribution holidays. There was a surplus to be distributed from two former pension plans and the court also concluded the employer was entitled to take a contribution holiday. At trial, ((1990), 66 D.L.R. (4th) 230 (Alta.Q.B.), 1990 CarswellAlta 313) Moore, C.J.Q.B. concluded both were entitled to their costs on a solicitor/client basis from the surplus before it was to be divided. No reasoning is given for that conclusion.

Similarly, at the Supreme Court of Canada, Cory, J. concluded that costs of the appeal be paid from the surplus in the fund on a solicitor/client basis.

[30] In the contribution holiday cases cited at the original hearing, costs were not awarded from the pension fund and in all but two the unsuccessful party was personally responsible for the costs.

[31] Little guidance can be taken from cases where there is no discussion of the nature of the proceeding and where costs were ordered to be paid from the pension fund. In many cases, there was an actual surplus to be distributed because the plan was wound up, unlike here where the plan is ongoing. In cases where the plan was ongoing, such as *Alcan* and the two *Patrick* decisions, the decision against the employer would not have had the consequence of requiring a huge payment into the pension fund.

[32] In *White*, (in para. 101 quoted above) the court said that, in exercising discretion with respect to a costs award, the circumstances of each case must be considered and the "relevant considerations weighed and balanced."

[33] Having regard to the circumstances of this case, I conclude costs should not be paid from the pension fund. I conclude this was adversarial litigation with major consequences for Michelin if it had been unsuccessful. Unlike the decisions referred to above, where the plan members were seeking either a payout from an actual surplus on windup or seeking to ensure their pension benefits were not affected in future, the applicant or the group he represented would have only obtained a benefit if, in the future, the ongoing Michelin Pension Plan was wound up and, at the date of the wind-up, the plan had an actual, as opposed to an actuarial, surplus. The Michelin Plan is a Defined Benefit Plan and payment of $268 million into the plan would have no effect on benefits. Furthermore, *Schmidt*, supra, made it clear that contribution holidays are not an encroachment on the funds held in a pension fund. The applicant relied principally on two Court of Appeal decisions, one from Quebec and one from British Columbia, each of which I concluded was later over-ruled by their respective courts of appeal.

[34] Although not pursued at the hearing before me, there were allegations in the affidavit of Everett Smith, sworn on June 10, 2005, that Michelin made misleading statements to its employees about the pension (para. 12); and did not keep a

separate accounting of the Michelin Pension Plan upon its merger with the Uniroyal Goodrich Plan (para. 14).

[35] In *Alcan*, *supra*, Levine, J.A. awarded costs from a pension fund to the unsuccessful party even though, as she said in para. 57:

> 57 The plaintiffs did originally claim that the respondents were in breach of their fiduciary obligations.

However, she continued in that same paragraph:

> 57 ... The issue in the summary trial and on the appeal, however, was only the interpretation of the Plan and whether the amendment was valid. Although the issue was of interest to only a particular class of beneficiaries, it was connected with the administration of the trust.

[36] In *Patrick*, *supra*, Donald, J.A. said in para. 20 that he did not disagree with the trial judge's characterization that the matter was not adversarial in nature and involved the interpretation of the plan. He said:

> 20 ... The primary matter at issue was the true construction of the Plan and did not involve any adversarial element, nor would the outcome affect any other beneficiary under the Plan. ...

[37] He quoted the chambers judge at para. 19:

> [23] I am satisfied that notwithstanding that there was and indeed remains a claim in damages against the defendant, that is not a basis upon which to decline an award of costs under the *Buckton* framework in these circumstances. On the summary trial to which this application for costs relates, the issue of damages did not and could not have arisen. No time was spent on the question of whether the amendment amounted to a breach of a fiduciary duty. The issue and the result was primarily one of interpretation and to that extent not unlike Canadian Association of Smelter and Allied Workers, Local 1.
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> [24] Further, I am satisfied that the application I heard was not adversarial in the sense used in *Buckton*, that is, 'as between beneficiaries'. There is no evidence to suggest that the result of the proceeding will reduce the benefits to which other members of the plan would otherwise be entitled. ...

[38] The matter went on to trial and, in the trial decision, E. Rice, J. said in para. 23:

> 23 An important distinction between *Turner* and the case at bar is that this case did not involve a distribution of a limited surplus where the plaintiff's success would necessarily mean that other beneficiaries would get less. Because the Telus pension plan was a defined benefit plan, if the plaintiffs had been successful in this action there would have been no change to the pension entitlement of any employees who had not yet reached the consent milestones under Section VII of the Plan.

He determined that the costs of the unsuccessful plaintiff should be paid from the fund. He referred to *Buckton* and said in paras. 31 and 32:

> 31 On the whole, I find that the same can be said for this case. The allegations of breach of duty against the trustees are adversarial in one sense, but they are not adverse to the interests of other beneficiaries. The plaintiffs' pleadings may have warranted the attention in their framing suggested by Newbury J.A. in *Turner*. On the whole, however, the pleadings as framed adequately disclose a desire for directions on the scope of the trustees' authority under the Plan.
>
> 32 The court in *Buckton* granted costs payable out of the fund on the basis that: 'the rights of the parties and the duties of the trustees have been finally settled.' That is what occurred in this case, and I hold that the plaintiffs are entitled to their special costs out of the Plan.

[39] Although in *Alcan* and the two *Patrick* decisions allegations of breach of fiduciary duty were not found to be determinative against awarding the applicant's costs from the pension fund, the issue in those cases was far different from that here. In *Alcan*, the issue was the effect on members' pensions of excluding overtime earnings from the definition of pensionable earnings. In both *Patrick* decisions, the issue was the elimination of so called "consent pensions." The effect of the pension amendments was to prevent certain employees from becoming eligible for a pension after twenty years of service and having reached age fifty-five.

[40] In those cases, the employers' actions had a direct effect on employees: either a reduction in their benefits or a limitation on when employees could retire on pension.

[41] It is noteworthy that, in this case, the application did not involve the trustees of the pension fund, but the employer. The matter was not one of how the trustee should administer the plan, but one of the employer's obligation to contribute to, not administer, the plan.

[42] Even in *Re Buckton*, Kekewich, J. said that, where the issue is adversarial, costs are awarded in the usual fashion. He said at p. 415 (as quoted above):

> ... when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs.

[43] In my view, an adversarial proceeding is not limited only to a situation where there are competing claims of plan beneficiaries or where the success of the plaintiff's claim will adversely claim other beneficiaries. In a case like this, the result of a successful application would be that the defendant employer would have to pay a large sum into an ongoing defined benefit plan. Because of the nature of a defined benefit plan, the introduction of a further $268 million into it would have no effect on members' benefits. The possibility of a benefit to the members would be if, in the future, the plan were to be wound up and had an actual surplus then.

Accordingly, I characterize the proceeding as adversarial. I conclude it "was no friendly court application" (quoting again from *White*). Michelin was not involved in this proceeding as a disinterested participant like a trustee, seeking the court's interpretation of the plan or how it should be administered. A successful result would have been extremely "adverse" to Michelin.

[44] Under the circumstances, the usual costs award should be made, that is, the successful defendant is entitled to its costs from the unsuccessful party.

AMOUNT OF COSTS AWARD

[45] Michelin seeks a costs award under Tariff A. Alternatively, if the award is made under Tariff C, Michelin seeks a lump award in addition to Tariff C costs; or, alternatively, a lump sum for its costs in lieu of tariff costs.
The applicant says that, if costs are awarded only to Michelin, they should be paid from the pension fund or, if to be paid by the applicant personally, they should not be a penalty or in an amount that would have a "chilling effect."

[46] The applicant's submissions about a "penalty" or a "chilling effect" are made in the context of his submission that the application was about the administration of the pension plan. Since I have concluded that this is an adversarial proceeding, costs should be determined in the usual way, that is, by referring to the tariffs provided for in *Civil Procedure Rule 63*.

[47] As Saunders, J. (as he then was) said in *Landymore v. Hardy*, [1992] N.S.J. No. 79 (S.C.T.D.) at p. 3:

> Costs are intended to reward success. Their deprivation will also penalize the unsuccessful litigant. One recognizes the link between the rising cost of litigation and the adequacy of recoverable expenses. Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged. Winning counsel's fees will not be entirely reimbursed, but ordinarily the losing side will be obliged to make a sizeable contribution.

[48] I agree with Michelin that Tariff A is the appropriate tariff. It is for costs in a "proceeding." Proceeding is defined in *Civil Procedure Rule 1.05(w)* as:

> (w) 'proceeding' means any action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons, originating motion, or in any other manner;

[49] Although heard as a complex chambers matter, it was the final hearing in this matter. Therefore, the appropriate tariff is Tariff A.

[50] In *Keating v. Bragg*, [1977] N.S.J. No. 312 (C.A.), Hallett, J.A. said in para. 11:

> 11 The appellants' application, which was commenced by an originating notice, is a proceeding within the meaning of the Civil Procedure Rules. Every application to court is not a proceeding within the meaning of that term in Tariff A but where an application involved several days of hearing, including the adducing of evidence, it is not an error by the presiding judge to consider it a proceeding for the purpose of awarding party and party costs. It is a matter within

> the discretion of the presiding judge, taking into account the extent to which the proceeding mirrors a trial proceeding.

[51] Subsequently, in *Re Murray Estate*, [2000] N.S.J. No. 255 (S.C.), Goodfellow, J. at para. 13 said that Tariff A is "only to be used when the chambers application is complex, lengthy and approximates a trial."

[52] Similar to *Keating*, this application involved three days of hearing and the filing of extensive affidavits. It was a complex and lengthy matter similar to a trial. The hearing which was held is the very hearing contemplated by the issuance of an originating notice (application inter partes), which commenced this proceeding.

[53] The first step in determining the costs payable pursuant to Tariff A is to determine the amount involved. There can be no question that, in this case, the amount was $268 million. That was the amount the parties agreed upon as evidenced by the Consent dated April 18, 2007 and filed with the court.

[54] Based upon Tariff A, the basic scale, where the amount involved is greater than $1 million, is derived by multiplying the amount involved by 6.5%. As

Michelin points out, that would result in a costs award far greater than its actual costs. Michelin is not seeking such a costs award.

[55] In *Williamson v. Williams*, [1998] N.S.J. No. 498 (C.A.), in para. 24 Freeman, J.A. referred to *Landymore, supra*, where Saunders, J. quoted from the Costs and Fees Committee:

> 24 ...the recovery of costs should represent a substantial contribution towards parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.

Freeman, J.A. then said in para. 25:

> 25 In my view a reasonable interpretation of this language suggests that a 'substantial contribution' not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.

[56] In awarding costs in this case, I should award an amount which is a substantial contribution but not complete indemnity of Michelin's costs.

[57] In *Williamson, supra*, under the old tariff, the costs award, including a lump sum award in addition to the tariff costs, was $44,180.00 where the evidence was that the fees charged were $80,000.00 not including all the proceedings. As Freeman, J.A. said in para. 26:

> 26 Even if evidence of the exact legal fees Dr. Williamson is to be charged were before us, this would not be determinative. An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary.

[58] The applicant takes issue with the amount of Michelin's solicitor/client costs if they are to be relevant to the amount of party/party costs. He says in considering what would ordinarily be charged by any competent lawyer for like services, the fees of the applicant's counsel experienced in pension litigation should serve as "the absolute ceiling" for a costs award.

[59] Both parties retained out-of-province counsel experienced in pension litigation. The applicant's counsel from London, Ontario, has thirty-one years at the Bar and charged an hourly rate of $375.00. Counsel for Michelin, from Toronto, has twenty-eight years at the Bar. He charged hourly rates of $725.00 per

hour (2005); $750.00 per hour (2006) and $775.00 per hour (2007). Senior local counsel charged hourly rates more in line with those of Paul Vogel. I use an hourly rate of $375.00 as a rough guide as to what competent counsel would charge for a matter such as this.

[60] No issue was taken with the disbursements included in Michelin's invoices. I am therefore satisfied that the costs award should include its disbursements, inclusive of GST and HST, in the amount of $99,377.95.

[61] I conclude that a substantial but not complete indemnity for Michelin's costs in all the circumstances of this case is $500,000.00 plus the disbursements referred to above.

[62] I must now determine how those costs should be paid.

HOW THE COSTS AWARD SHOULD BE PAID

[63] Michelin says its costs should be paid by the applicant personally. The applicant says if only Michelin is to have its costs, they should be paid through the

pension fund or, alternatively, if to be paid by the applicant, they should not be in a substantial amount.

[64] The applicant is a retired plan member acting in a representative capacity for all plan members, member spouses and beneficiaries. Any plan surplus on windup belongs to the members not to Michelin. If costs are paid from the plan to Michelin, it may reduce any actual surplus payable if the plan is wound up.

[65] On the other hand, Michelin says, because it is the only contributor to the plan, ordering costs from the plan is tantamount to ordering Michelin to pay its own costs. This issue is addressed in part in *Kerry* at para. 20 where Gillese, J.A. said:

> 20 Where the litigation is adversarial, however, there is an inherent unfairness in ordering costs from the Fund because it results in less money being in the Fund and, therefore, available for the benefit of all plan members. That unfairness is compounded in the present case because the pension plan is ongoing. As the employer and plan sponsor, Kerry is responsible for the Fund's solvency. If costs are paid from the Fund, Kerry may be required to contribute more in future than it might otherwise have been required to pay. If that occurred, Kerry, the successful litigant, would be paying the costs of the unsuccessful litigants. That does not accord with our basic notions of fairness in the adversarial litigation process.

[66] As I have concluded that the applicant's costs should not be paid from the fund, the comments of Gillese, J.A. do not entirely address the situation in this case. In *Kerry*, a limited group would have benefited from a successful result. Hence, Gillese, J.A.'s comment about there being less money in the fund for "all plan members" is not the case here. Consequently, that element of unfairness does not occur here.

[67] She also referred to the possibility that Kerry might end up in effect paying the costs of the unsuccessful party. She pointed out that Kerry was the party responsible for "the Fund's solvency." She said that would not be in accord with the principles of fairness where the proceeding was an adversarial one. That unfairness does not occur here either. The costs of the unsuccessful applicant are not to be paid from the fund. It is true that, if Michelin's costs are paid from the fund, it may still have an effect on future contributions required by Michelin to ensure the fund's solvency. If that were the case, Michelin would, in effect, be paying its own costs. There have been a number of years when the plan has had an actuarial surplus. In those years, I concluded Michelin could take a contribution holiday. As noted above, the parties agreed on these amounts. The agreed upon valuation of contribution holidays is:

1984 - 1988	$175,533,860	
1995 - 2001		$174,635,976
TOTAL	$350,169,836	

Netted out against this is the agreed upon amount of Special Payments Michelin made to eliminate actuarial deficits:

1989 - 1992	$ 3,526,299
2001 - 2005	$77,780,000
TOTAL	$81,306,299

[68] The result is $268,863,537 which Michelin did not have to pay into the pension fund because of permissible contribution holidays. It continues to have the ability to take contribution holidays when the plan has an actuarial surplus and continues to be required to make Special Payments when the plan has an actuarial deficit. Balanced against that is the possibility that the reduction in the plan surplus resulting from paying Michelin's costs from the plan would, if there were a plan windup, affect the members and beneficiaries since they, and not Michelin, are entitled to any actual surplus on windup.

[69] I must also bear in mind the comments of Saunders, J. in *Landymore*, quoted above.

There must be some element of Michelin being rewarded for its success at the expense of the unsuccessful party. Michelin was entirely successful on every issue. Furthermore, it spent a substantial amount of time preparing to deal with issues that were subsequently dropped. Also, it is to have its costs of the interlocutory application as part of its costs in the cause.

[70] In my view, an award of costs against the applicant is appropriate to further the objectives referred to by Saunders, J. in *Landymore*. On the other hand, the applicant and the group he represents are the only ones entitled to a surplus on plan windup. There is some risk that Michelin may have to make greater payments to the fund in future to ensure its solvency. Weighing all these considerations, I conclude that the costs award should be paid in part by the applicant and in part by the fund. In my discretion, I therefore order the costs award to be paid fifty percent by the applicant and fifty percent from the pension fund.

Hood, J.