SUPREME COURT OF NOVA SCOTIA

Citation: Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General), 2011 NSSC 429

Date: 20111121
Docket: Hfx 184701
Registry: Halifax

Between:

Cherubini Metal Works Limited

Plaintiff

v.

The Attorney General of Nova Scotia

Defendant

DECISION: Costs on Trial

Judge: The Honourable Justice Patrick J. Duncan

Heard: September 22, 2011 in Halifax, Nova Scotia

Counsel: George MacDonald, Q.C., and Michelle Awad, for the plaintiff

Michael Pugsley and Duane Eddy, for the Defendant

By the Court:

INTRODUCTION

[1] Following 27 days of trial, I issued a lengthy decision dismissing the plaintiff's claims against the defendant. That decision is reported at *2009 NSSC 386* and contains a comprehensive review of the facts as I found them.

[2] The issues of liability and damages were bifurcated prior to trial and so my decision did not assess damages.

[3] I concluded that the parties should each bear their own costs. I made that determination without inviting the parties to make representations.

[4] The plaintiff appealed the decision on liability, but unsuccessfully. *see, 2011 NSCA 43*.

[5] The defendant successfully cross appealed against my order that the parties bear their own costs and the case was remitted to me for determination of costs.

[6] I invited the parties to seek agreement, but they have not been able to achieve resolution of the costs dispute. I have received and considered affidavit evidence, Briefs and oral argument.

POINTS IN ISSUE:

1. Are costs to be assessed in accordance with the **1972 Civil Procedure Rules,** or the current rules which came into effect on January 1, 2009?

2. If costs are payable, then in what amount and on what basis?

3. Is the defendant entitled to disbursements and if so in what amount?

ANALYSIS

Issue 1: *Are costs to be assessed in accordance with the* ***1972 Civil Procedure Rules,*** *or the current rules which came into effect on January 1, 2009?*

[7] This action was commenced in 2002 and the trial was completed in November of 2008. The transition provisions of the current Rules state, at Rule 92.02(2):

> (2) The Nova Scotia Civil Procedure Rules (1972) apply to all other proceedings started before January 1, 2009 unless a judge orders otherwise.

[8] Thus discretion does exist for the court to apply the current rules in appropriate cases. In my view this is not one of those cases.

[9] Costs consequences contemplated by the parties as they planned the litigation would have been ascertained by reference to the Rules then in effect. It would be capricious to impose a different regime that was created after the litigation was effectively complete. The **1972 Rules** will be applied to assess costs in this case.

Issue 2: If costs are payable to the defendant, then in what amount and on what basis?

Position of the Defendant

[10] The defendant seeks party and party costs on trial, plus costs of this hearing and disbursements throughout.

[11] It submits that costs on the trial should be a lump sum assessed on the following factors:

1. The complexity and length of the proceeding;
2. The risk to which the defendant was exposed by the claim;
3. An estimate of the defendant counsels' time expended.

[12] On this last point, affidavits of counsel for the defendant, Messrs. Pugsley and Eddy, have been filed. They are staff solicitors employed by the Province of Nova Scotia. They estimated a total time expended and notional hourly rates which would support total fees of $551,750 in the preparation for and conduct of the trial. They submit that costs allowed should be 75% of that amount and therefore the amount payable is $413,812.50.

Position of the Plaintiff

[13] The plaintiff submits that costs could justifiably be set at zero, but in the alternative that a lump sum assessment would be the appropriate mechanism to employ. The plaintiff takes issue with the quantum sought and the underlying analysis relied upon by the defendant in reaching its proposed disposition.

[14] The plaintiff submits that:

1. The value to be attached to defendant counsel's hours is significantly overstated, causing indemnification that far exceeds that which is justified in the circumstances.

2. The award of costs on appeal should be considered as a measure of appropriate costs on trial.

3. Costs should be reduced because of the conduct of the defendant's employees who dealt with the plaintiff during the period encompassed by the claim.

[15] Based on its analysis the plaintiff submits that costs on trial should be set at no more than $25,000.

Relevant Civil Procedure Rules

[16] **CPR (1972) 63.03 (1)** dictates that costs "shall follow the event" and are fixed on a party and party basis in accordance with **Rule 63.04.** This latter rule presumptively calls for an amount of costs set in accordance with the Tariffs and based on an "amount involved". It also sets out factors that a court might consider in fixing costs.

[17] As no specific "amount" was claimed or provisionally assessed in this case the determination of an appropriate award will be based on considerations that are not dependent on a fixed monetary value of the claim.

[18] The authority for a lump sum award of costs is found in **Rule (1972) 63.02**:

Costs in discretion of court

63.02.

> (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
>
> (a) award a gross sum in lieu of, or in addition to any taxed costs;

[19] Prior to the implementation of the current rules, concerns developed as to the ability of the Tariffs to provide an accurate and fair measure of appropriate costs and so resort was often had to this power to award a lump sum. This in turn generated judicial commentary that sought to provide guidance as to how this discretion might be exercised.

[20] Saunders J. (as he then was) spoke to the objectives that the court seeks to meet by costs determinations when he wrote in *Landymore v. Hardy 1992 NSR (2d) 410*:

> The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:

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

The court is and has always been concerned with the reasonableness of expenditures incurred in either advancing or defending a claim. The ever-increasing cost of litigation is a challenge which faces everyone touched by the adversary process, whether litigant, lawyer or witness.

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.

As it is the court's responsibility to assess the fairness and reasonableness of the effort expended, the trial judge will have to be told how much it cost the successful party to present or defend its case. Counsel will be expected to outline the amount of time spent on the file and the total fees charged the client, preferably in the form of a short affidavit filed with the court. Only then will a judge be able to assess whether those expenses were "reasonable" before going on to decide whether the costs to be awarded will in fact represent a significant contribution to such expenses.

By today's standards so much is measured in terms of a barrister's time. Nevertheless, fees for professional services must never be unreasonable or incurred to train the inexperienced, negate the improbable, pad the unnecessary or exaggerate the obvious. The Tariff cannot hope to attain its goal of providing a "substantial contribution" to the successful parties' reasonable expenses if those expenses are not disclosed to the court.

[21] The quantification of what constitutes " a substantial contribution not amounting to a complete indemnity" was attempted by Freeman J.A. writing on behalf of this court in *Williamson v. Williams et al.* (1998) 223 N.S.R. (2d) 78:

> 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.

[22] More recently, Moir J. set out a very helpful summary of principles in his decision reported as *Bevis v. CTV Inc.* 2004 NSSC 209:

> 13 ... (1) Costs are normally set in accordance with the Tariff. (2) However, the Tariff system serves the principle of a substantial but incomplete indemnity. The Courts do not choose artificial means, such as selection of an artificial "amount involved", in order to make the Tariff serve the principle. Therefore, when reasonable approaches to amount involved or scale under the Tariff fail to produce a substantial but partial indemnity, the Court may resort to its discretion under rule 63.02(a) and order a lump sum. (3) To settle an appropriate lump sum the Court will have regard to the actual costs facing the successful party or the labour expended by counsel, but the Court will seek to settle the amount objectively in conformity with one of the policies of the Tariff, to provide an indemnity that has nothing to do with the particularities of counsel's retention. The Court will attempt to provide a substantial but partial indemnity against what would ordinarily be charged by any competent lawyer for like services. (4) Finally, the Courts have usually avoided percentages. Substantial but partial indemnity is a principle, not a formula.

Considerations under Rule 63.04 (2)

[23] The courts' discretion in arriving at costs in a case like this is introduced in the Preamble to the Tariffs by stating that:

> (c) where there is a substantial non-monetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
>
> > (i) the complexity of the proceeding, and
> >
> > (ii) the importance of the issues;

[24] It has been suggested that this is not an exclusive list of factors for the court to consider. I agree.

[25] **Rule 63.04 (2)** provides a number of factors a court may consider in assessing party and party costs:

> (2) In fixing costs, the court may also consider
>
> > (a) the amount claimed;

(b) the apportionment of liability;

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

(d) the manner in which the proceeding was conducted;

(e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

(f) any step in the proceeding which was taken through over-caution, negligence or mistake;

(g) the neglect or refusal of any party to make an admission which should have been made;

(h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

(i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

(j) any other matter relevant to the question of costs.

[26] My assessment of how, if at all, these factors should impact on the costs award follows:

(a) the amount claimed;

Damages were never quantified.

(b) the apportionment of liability;

This is not relevant.

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

All counsel impressed me with the self imposed limitations on the number of witnesses called and the precision of their examination of the witnesses so as to maintain focus on the most important witnesses and the most important information that was relevant to the points in issue. But for that the trial might

have been much longer. Beyond this, there was nothing identified nor is apparent on the record that would make this a relevant factor.

(d) the manner in which the proceeding was conducted;

This is not an issue.

(e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

Nothing has been identified nor is apparent on the record that would make this relevant.

(f) any step in the proceeding which was taken through over-caution, negligence or mistake;

Nothing has been identified nor is apparent on the record that would make this relevant.

(g) the neglect or refusal of any party to make an admission which should have been made;

Nothing has been identified nor is apparent on the record that would make this relevant.

(h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

Not applicable.

(i) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

Not applicable.

(j) any other matter relevant to the question of costs.

[27] The parties have identified the following matters as relevant to costs:

- complexity of the proceedings;
- importance of the issues to the parties;
- principle of substantial indemnity;
- trial costs as a percentage of appeal costs allowed;
- conduct of the defendant.

Complexity of the Proceedings

[28] When this action was initially filed in 2002, it named the union representing some of the plaintiff's workforce as a co-defendant with the Crown. It was alleged that the defendant Crown, as the regulator of occupational health and safety at the plant, acted unlawfully and that the unlawful acts and/or omissions on the part of

the Crown caused and/or contributed to the failure of the plaintiff's Amherst based company, AFL.

[29] The claim against the union was dismissed by the Court of Appeal in 2007, on the basis that the Collective Agreement in place between the plaintiff and the union gave exclusive jurisdiction over the dispute to an arbitrator. *see, 2007 NSCA 38.*

[30] The plaintiff alleged that the defendant was liable in negligence, for intentional interference with economic relations, misfeasance in public office, and conspiracy. Some of the legal issues presented questions of law that were novel or unsettled. e.g., whether there was a duty of care owed by this regulator to a party in the circumstances of the plaintiff.

[31] I am advised that there was 49 days of discovery examination. There was extensive documentation to be reviewed and produced. There was a substantial amount of documentary evidence introduced and spoken to in the trial. There were 22 witnesses called at trial, and as previously noted, but for the agreements of

counsel many more might have been considered as having relevant and material information.

[32] I accept that this was a complex proceeding.

Importance of Issues

[33] The defendant submits that the consequences of a finding of liability had the potential to negatively impact on the public perception of the manner in which regulatory oversight of health and safety was managed. For this reason, it is suggested that the outcome was important.

[34] As counsel conceded in oral argument, some of my findings in relation to the conduct of the Department of Environment and Labour (DEL) were unflattering and may have had the "ripple effect" that the Crown says it was concerned about. Still, at the end of the day, the defendant was successful and there can be no doubt that a finding of liability would likely have had an even more deleterious affect on the reputation and credibility of the DEL.

[35] Aside from reputational damage, the potential monetary damages at issue could have been significant, perhaps in the seven figures range.

[36] The case was important to the plaintiff as well, who alleged that a very substantial business investment was lost in whole, or in part, because of the alleged tortious conduct of the defendant. It sought to be made whole financially, but it also had serious concerns about reputation. The actions of the Department, in its view, unfairly labeled the plaintiff as an unsafe workplace in the public eye. It specifically pointed to ill considered public comments made by Government Minister at the time of the dispute. The plaintiff hoped to correct that impression.

[37] I am satisfied that the case was important to both parties.

Substantial Indemnity: Estimate of Counsel's Time

[38] The right of the successful defendant to indemnification in this case is not in issue, and in particular that principle is not undermined by reason of counsel being salaried employees.

[39] Lead counsel for the defendant, Mr. Pugsley, estimates that his total time expended was 1268 hours of which 993 was committed to pretrial steps for the period 2002 to 2008. The balance in the total of 275 hours was incurred during 27 days of trial together with after-hours preparation. He conducted almost all of the examination and cross examination of witnesses. His hours demonstrate that he did most of the witness preparation and preparation of written submissions.

[40] He was admitted to the Nova Scotia Barristers' Society in 1982 and holds a position of Senior Crown Counsel. On this basis he valued his time at $400 per hour.

[41] In total then counsel put forward the value of Mr. Pugsley's time as 1268 hours @ $400 per hour for a cost of $507,200.

[42] Mr. Eddy, who assisted Mr. Pugsley, estimates his pretrial involvement at 67 hours and a further 208 hours during the trial for a total of $44,750. He is a Junior Crown Counsel who was admitted to the Bar in June 2008, a little over 2 months before the trial commenced. His time has been valued at $165 per hour.

[43] Mr. Eddy's time estimates show him to have spent a fair bit of time familiarizing himself with the file and some contribution to the legal research and writing. His role during the trial was largely to assist Mr. Pugsley in managing the documentary administration of the file. He prepared and conducted the direct examination of two witness and cross examined 1 witness.

[44] The plaintiff approaches the value of this work differently. They submit:

1. The reliability of the estimates is in question since there were no timesheets maintained on an ongoing basis, rather what has been presented is a retrospective approximation of work performed over several years and for a period that ended three years ago.

2. The reliability of the estimates is in question when measured against presumed work hour requirments of a salaried employee;

3. No evidence has been presented of the actual cost to the defendant of the lawyers employed to defend the matter.

[45] I do not take serious issue with the time estimates, although in the absence of time sheets, it is difficult to assess the reasonableness or necessity of much of the pretrial work. For example, the estimate of 450 hours for the conduct of 49 days for discovery excludes the preparation time and witness interview times which are separately listed in the time summary. As such it suggests 49 days of over 9 hours per day in discovery examination. It is not unheard of, and may very well be entirely accurate but it demonstrates the difficulty for the court in assessing it without the detail that is typically shown by time sheets that are created at the time.

[46] I am not prepared to draw the inference that because defendant's counsel are salaried in house counsel that they would be bound by a work schedule that is less than that of lawyers in private practice. In litigation, the demands of the case typically drive the schedule, not the hours of the business office.

[47] I do have reservations with respect to the hourly rates submitted as the basis against which costs should be assessed in this case.

[48] The use of a private practitioner's hourly rate is not necessarily a fair measure of the costs incurred by the government who employs in house counsel to defend. To know whether it is an accurate comparison would require information that is not before the court on this motion.

[49] The hourly rate charged by private practice lawyers is intended to include costs that would not be part of a government overhead or may be significantly different for the government. e.g., marketing, promotion, costs of premises, professional liability insurance costs. The hourly rate has a direct relationship to the compensation that the lawyer receives which may be greater than, or lesser than, that paid to in-house counsel. Annual billing targets may impact on the hourly rate and the hours expected to be billed in a given time period. The salaried employee for government has their compensation set without reference to these fundamental benchmarks. Benefit programs have a cost to the employer that may or may not be reflected in an hourly rate.

[50] I had a further concern with the evidence presented initially by defence counsel in that the hourly rate of $400 used to make the calculation was a 2011 rate and so I requested and received from counsel an affidavit that provided a better

range of hourly rates charged by private counsel of Mr. Pugsley's seniority and in the time frames that the work was done by Mr. Pugsley in this case, 2004-2008. The ranges are:

2004	$255-$300
2005	$290-$325
2006	$300-$330
2007	$325-$330
2008	$335-$340
Avg Range for 5 years	$300-$325

[51] To use defense counsel's calculations would provide an account for 1268 hours @ $300 of $380,400, and $412,100 at the $325 per hour rate. Of course, this is demonstrably artificial since it presumes that the work performed was evenly spread through the years and, as already pointed out, that this hourly rate is reflective of the true cost of counsel to the defendant.

[52] Again, by way of hypothetical, if those same senior counsel, whose information I have been provided by the defence, have a billing target of 1268

hours per year, should the costs of the defendant be calculated on that private counsel's yearly compensation or the actual one year cost to the government of the lawyer employed to conduct the case? Asking the question demonstrates the unreliability of assessing exclusively on the basis of a comparison of hourly rates charged by counsel in private practice with similar years at the bar.

[53] Plaintiff's counsel takes the analysis to a further extreme and postulates that the annual working hours of government counsel would be 1960 hours (approximately a 37.5 hour work week) and at a $400 per hour rate, Mr. Pugsley's cost to the government would be $784,000 per year. Mr. Eddy's cost would be $323,400 per year based on 1960 hours at $165 per hour. I do not accept this either as a basis to assess the cost of counsel to defend.

[54] I take guidance from Justice Moir in *Founders Square Ltd. v. Nova Scotia (Attorney General)*(2000) 186 N.S.R. (2d) 189 who offered the following on how the court might approach the determination of costs in such circumstances:

> 7 Where counsel is an employee of the successful party and is free of the drudgery of time keeping, I would receive an estimate of the time involved and details supporting that estimate. I would consider that estimate in light of prevailing rates for lawyers of similar seniority in private practice because such

> will provide a basis for approximating the cost of salary, benefits and overhead. However, even with such an approximation, I would rely upon my own general knowledge of costs, the relevant factors set out in Rule 63.04(2) and my knowledge of the case to set a reasonable fee. ...

(emphasis added)

[55] I will assess costs with these same principles in mind.

Trial Costs as a percentage of Appeal Costs

[56] The court of appeal awarded the defendant $22,500 as their costs on the appeal, which resulted in a one day hearing. The plaintiff points out that costs on appeal are routinely set at 40% of trial costs. If applied in this case that would set trial costs at $56,250. I agree with the defendant that would not, in this case, provide a reasonable estimate of the costs to the defendant.

Defendants' Conduct

[57] In its initial submission, the plaintiff argued that I retain the discretion to deny costs to the defendant and that I can consider the conduct of the defendant in that assessment.

[58] The defendant says that conclusion is not supported by a reading of the appeal court's decision:

> [116] A review of the record does not disclose a sound basis for the trial judge's failure to award costs to the Attorney General. At trial, Cherubini led evidence that the DOEL, by their actions, engaged in conduct which was intended to be an intentional interference with Cherubini's economic relations. They also argued that the Attorney General committed the tort of misfeasance in public office, conspiracy, and finally, regulatory negligence. It was unsuccessful on every one of its causes of action. Further, the trial judge found the OHSD officials, at all times, acted in good faith and in accordance with their statutory mandate.
>
> [117] With respect, the costs of this matter should have followed the event and the trial judge erred by failing to so order, or at least explain why he was departing from the general rule. However, unlike the situation in ***McPhee v. Canadian Union of Public Employees, supra,*** we do not have sufficient information before us which would allow us to determine the appropriate amount of costs. As a result, I would remit the issue to the trial judge for determination of the appropriate amount of trial costs.

[59] The plaintiff outlines what it understands to be the "Basis of my Decision" for refusing to award costs to the defendant at the conclusion of the trial. In its

brief of September 14, 2011, at pages 11-20, the plaintiff includes excerpts from 54 paragraphs of my decision where I was critical of the conduct of the defendant's officials in the manner in which they effected regulatory oversight of the plaintiff's Amherst business.

[60] For the most part the plaintiff has correctly identified the concerns that underpinned my decision as to costs. The problems I identified were found in the conduct of departmental employees ranging from the field inspector all the way through to the most senior managers and even to the Director level.

[61] I concluded that the plaintiff had good reason to be troubled by the manner in which it was sometimes treated by the defendant's officials. At times the letter and the spirit of the relevant statutory provisions and the defendant's own internal policies were ignored or not complied with in material ways. I found that the defendant repeatedly failed to engage the plaintiff in the manner that the tripartite system in the legislation called for. In doing these things they sometimes acted in a reckless or high handed manner. In saying this I am in no way retreating from my conclusion that, notwithstanding these shortcomings, it was not sufficient in light of the law and the totality of the facts so as to attach liability to the defendant.

[62] It is an open question whether if these officials fulfilled their obligations with a more open mind to the concerns of the plaintiff and with an eye on the relevant legislative and policy obligations the Crown would ever have found itself defending in this action.

[63] The defendant says that the court of appeal has adjudicated this question and concluded the there was no conduct on the part of the defendant that warranted a reduction of the costs to which the defendant might otherwise be entitled.

[64] The plaintiff disagrees. It says that the matter was remitted without limitations on this court's discretion. To suggest otherwise would, in its submission, prejudice the plaintiff who would lose the opportunity to put forward what would otherwise be a valid consideration to be weighed in an overall assessment of the costs to be awarded. This would be occasioned through no fault of its own since it too was denied the opportunity to make submissions as to costs at the end of the trial.

[65] I note that a party's pre-litigation behavior has been held to be a relevant consideration in deciding the amount of costs awarded. *see, HMC Group v. Nova Scotia (Attorney General)* 2000 NSJ 335 (NSSC); at para 91; *Rhyno Demolition Inc. v. Nova Scotia (Attorney General)* 2005 NSSC 147, at paras. 16-18, and paras. 27-29; *Donald v. Friesen* (1992) 72 O.R. (2d) 205 (Ont. Dist. Ct.) at the final paragraph.

[66] The appeal court had all of this information before them, both the transcript of evidence and the negative findings I made with respect to the defendant's conduct. They specifically reject the conclusion that the record disclosed a sound basis to deny the defendant costs. *see, para. 116:*

> A review of the record does not disclose a sound basis for the trial judge's failure to award costs to the Attorney General.

[67] When this is read in conjunction with their para. 117, I take the court's direction to mean:

1. That I did not give reasons to justify the refusal of costs;

2. That they independently looked at the record and found that it could not, on its own, justify the denial of costs;

3. That the costs should follow the event;

4. That the matter is remitted to me to exercise my discretion in setting the quantum of costs.

[68] I do not take the decision to mean that my discretion is limited in setting the quantum. Instead, I must hear and consider submissions; determine those facts which are relevant to an assessment of costs; consider the case and statutory authority; and arrive at a considered exercise of the discretion founded on sound principle. To that end, the conduct of the defendant remains a factor, but it is only one factor to be weighed and balanced with others.

[69] In this case, I am still of the view that it should negatively impact on the recovery of costs by the defendant, but having regard to the totality of the information before me on the motion it does not support a reduction of costs to zero, or even a nominal amount.

CONCLUSION: COSTS

[70] Under Tariff A, the length of trial is an “additional factor” to be included in calculating cost and would amount to $54,000 at $2,000 per day for 27 days.

[71] While an amount involved has not been fixed in this case, I have acknowledged that the risks were high in both reputational and monetary damage. Tariff A would provide costs ranging from $48,562 to $80,938 where the amount involved was $1,000,000, which is a very substantial amount. When one looks at the length of trial, the complexity, and the importance of the issues, some guidance is found in this type of range. I am also mindful of the pretrial work which has been estimated.

[72] Following upon the approach of Moir J. in *Founders Square Ltd. , supra*, and having considered the evidence and submissions, I have concluded that the formula offered by defendant’s counsel for the calculation of the legal costs incurred by the Crown in this case is not adequately substantiated, particularly as to

the cost to the employer and work expectations of counsel for the remuneration paid - an amount which is not before me.

[73] This is in no way a reflection on the quality of the representation provided by counsel for the defendant, who presented the case professionally and competently. Rather it is an exercise in achieving substantial indemnity to those who pay their "account".

[74] I have concluded that costs in this case would be justified in the amount of $140,000, which sum is intended to represent an increase for the complexity and importance of the issues advocated as well as an estimate of the reasonable costs against which indemnity should be calculated. I will reduce the amount otherwise payable by 25% to reflect the defendant's pre-litigation conduct concerns I have identified.

[75] In the result, the plaintiff will pay costs to the defendant in the amount of $105,000 which sum is payable forthwith.

Issue 3: Is the defendant entitled to disbursements and if so in what amount?

[76] The defendant seeks reimbursement of disbursements it incurred in defending the action. It has not quantified those disbursements and offers no evidence in support of the claim.

[77] **Rule (1972) 63.10A** provides that:

> **Disbursements**
>
> 63.10A Unless the court otherwise orders, a party entitled to costs or a proportion of that party's costs is entitled on the same basis to that party's disbursements determined by a taxing officer in accordance with the applicable provisions of the Tariffs.

[78] I am satisfied that the defendant is entitled to its' reasonable disbursements, but in the absence of a solicitor's affidavit that provides the necessary detail to assess whether the amounts are reasonable and necessary. I am unable to a make an order at this time.

[79] During oral argument, counsel for the parties agreed that the defendant would provide the supporting information to plaintiff's counsel and they would

attempt to resolve this without the court's assistance. If the parties are unable to agree then I will receive their further written submissions on this issue.

Issue 4: Costs of the Costs Motion Hearing

[80] The defendant will have costs on this motion in the amount of $750.00 payable forthwith.

[81] **Order accordingly**.

Duncan, J.