<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *Septic Pumping Services v. ABCO Industries Ltd.*, 2019 NSSC 344

Date: 20191206
Docket: Hfx No. 475330
Registry: Halifax

Between:

Septic Pumping Services, Septic Solutions, Sunland Sewer Company
Applicants

v.

ABCO Industries Ltd.
Respondents

And

International Trucks, Navistar Canada Inc., Silver's Garage (2008) Limited

Third Parties

Judge:	The Honourable Justice Ann E. Smith
Heard:	July 15, 2019, in Halifax, Nova Scotia *[Special Time Chambers – Motion for Security for Costs]*
Counsel:	Richard W. Norman, for the Applicants Sarah A. Walsh on behalf of Christopher W. Madill, for the Respondents Robert Mroz, watching brief for the Third Parties

By the Court:

Introduction

[1] By Notice of Motion filed June 6, 2019, the Respondent, ABCO Industries Ltd. (ABCO) moves for an order requiring the Applicants, Septic Pumping

Services, Septic Solutions, and Sunland Sewer Company (the "Applicants") to provide security for costs.

[2] The evidence on the motion consisted of the Affidavits of counsel, Nathan Officer, Wayne Officer and portions of the Affidavit of Graham Gerhardt.

Issue

[3] The sole issue on the motion is whether ABCO's motion for security for costs should be granted, and if so, in what amount.

Background

[4] The underlying action is framed as an Application in Court and concerns ABCO's sale of a mobile dewatering truck ("MDT") to the Applicants in December, 2014. The Applicants provide pumping services and cleaning of residential and commercial septic tanks in San Diego, California.

[5] ABCO is a manufacturer of engineered equipment designed and fabricated with metal. Its office is in Lunenburg, Nova Scotia.

[6] The MDT is mounted on a truck chassis. ABCO claims that the Third Parties, International Trucks and Navistar Canada and Silver's Garage (2008) Limited Inc., manufactured and supplied the truck chassis for the MDT. The Third Parties did not participate in, or take a position on this motion.

[7] The Applicants claim that since they purchased the MDT from ABCO there have been numerous problems with its operation.

[8] The Applicants claim, against ABCO, *inter alia*, damages for breach of contract, negligence and negligent misrepresentation.

Law and Analysis

[9] *Civil Procedure Rule* 45 applies to this motion. Its relevant portions provide as follows:

> **Scope of Rule 45**
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> **45.01 (1)** This Rule provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.

(2) A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.

Grounds for ordering security

45.02(1) A judge may order a party who makes a claim to put up security for the potential award of costs in favour of the party against whom the claim is made, if all of the following are established:

(a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;

(b) the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;

(c) the undue difficulty does not arise only from the lack of means of the party making the claim;

(d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

(2) The judge who determines whether the difficulty of realization would be undue must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.

(3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:

(a) the party making the claim is ordinarily resident outside Nova Scotia;

(b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;

(c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;

(d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 – Notice.

(4) A judge may also order security for costs in either of the following circumstances:

(a) the security is authorized by legislation;

(b) the same claim is made by the same party in another proceeding, and it is defended or contested by the party seeking security for costs on the same basis as in the proceeding in which security for costs is sought.

[10] In *Emmanuel v. Simpson Enterprises Limited*, 2007 NSSC 278, Associate Chief Justice Deborah Smith (as she then was) outlined the two competing principles at play when security for costs is sought.

[11] On the one hand, it is necessary to "ensure that people of modest means are not prevented from having access to the court as a result of their financial status." On the other hand, "the interests of justice are not served if the plaintiff is artificially insulated from the risk of a costs award."

[12] The current *Rule* 45 postdates *Emmanuel*; however, Moir J. of this Court reviewed the new *Rule* and the principles which remain constant, in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd. 2012 NSCA 89:

> 21. The need remains for a balance between access to justice and artificial insolation from an award of costs. On the more detailed principles:
>
> 1. Rule 45.02 provides a broad discretion. The limit on discretion commented on by Justice Goodfellow in *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 at para. 19 is not severe. The judge has a free hand to do what is just, so long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair, see Rule 45.02(1), or establishes special grounds under Rule 45.02(4).
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> 2. The new rule does not change the principle that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward.
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> 3. The principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court are reinforced by the ground prescribed by Rule 45.02(1)(c).
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> 4. The new rule does modify the principles about impecuniosity. Now, the burden is on the defendant under Rule 45.02(c) if the plaintiff is an ordinary individual rather than a nominal plaintiff or a corporation under Rule 45.02(3)(c). For nominal plaintiffs and corporations, the burden remains as stated by the Associate Chief Justice.
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> 5. The principle about foreclosing the suit, that an order should not be made that prevents the plaintiff from proceeding unless the claim obviously has no merit, remains unchanged. Indeed, it is enhanced by Rule 45.02(1)(d).

[13] *Rule* 45 is discretionary. A judge "may" order security for costs if various parts of the test are met.

The Applicants' Position in Brief

[14] The Applicants say they are impecunious. They say that their impecuniosity "is related, in no small measure", to the losses they allege are a result of their claim for damages.

[15] The Applicants say that their claim has merit, and that an order for costs made in Nova Scotia can be enforced in San Diego, California, where the Applicants reside. The Applicants also say that ABCO has delayed bringing this motion.

ABCO's Position in Brief

[16] ABCO says that the Applicants are situated in the United States, and have no assets in Nova Scotia. ABCO says that pursuant to *Rule* 45.02(3) the law presumes that ABCO will have undue difficulty realizing on a judgment for costs by virtue of the fact that each of the Applicants are ordinarily resident outside of Nova Scotia.

[17] In addition, ABCO says that Septic Pumping Services is a corporation that does not appear to have sufficient assets to satisfy a judgment for costs.

[18] ABCO further says that the presumption in favour of an order for security for costs cannot be rebutted because undue difficulty does not arise solely from the Applicants' lack of means.

[19] ABCO says it would be unfair to allow the Application to continue without an order for security for costs.

Law and Analysis

Preliminary Issues – Affidavits of Nathan Officer and Wayne Officer

[20] In response to ABCO's motion for security for costs, the Applicants filed and rely upon the Affidavit of Nathan Officer, sworn in California on July 8, 2019.

[21] Mr. Nathan Officer is the Chief Operating Officer of the Applicant Septic Pumping Services. He describes himself as the principal of the Applicant Sunland Sewer Company.

[22] ABCO's counsel takes issues with certain statements in paragraphs in Nathan Officer's Affidavit. The first objection is to the second statement in paragraph 9 which reads as follows:

> 9. In this proceeding, ABCO often has asserted that the problems with the MDT relate the chassis and not the items that ABCO specifically manufactured. I observe that the MDT chassis is not properly rated for the weight of the equipment and laden weight ABCO has put onto the chassis. The chassis was selected by ABCO.

[23] Counsel for ABCO says that Mr. Officer's reference to, "I observe" is really an attempt to provide inadmissible opinion evidence. This Court advised counsel for ABCO that it would not strike this portion of paragraph 9, but would afford it little weight on this motion.

[24] The second objection to the contents of Nathan Officer's Affidavit advanced by counsel for ABCO relates to paragraph 13, which provides:

> 13. My father Wayne and I recently attempted to borrow money from lenders to continue with this litigation. We were rejected three times. We were rejected by U.S. Bank twice – once with Septic Pumping applying and the other time with my father Wayne applying. <u>U.S. Bank advised us that our debt to income ratio was too high</u> (93:7 debt to income).
>
> [emphasis added]

[25] Counsel says that that underlined statement, "U.S. Bank advised us that our debt to income ratio was too high…" is an out of court statement tendered for the truth of its content and for which Mr. Officer does not state his belief in the source. ABCO says that this is inadmissible hearsay and should be struck.

[26] Mr. Norman, counsel for the Applicants responded to these objections by saying that his client was prepared to withdrawn the impugned portions of paragraph 13.

[27] Had Mr. Norman not so advised, the Court would have struck the impugned portion of paragraph 13 on the basis that it is inadmissible hearsay. A letter or other written document from a representative of the bank advising that the Applicants' debt to income ratio was too high would have been admissible. This hearsay statement is not and is struck.

[28] Counsel for ABCO also objects to paragraph 15 of Nathan Officer's Affidavit which merely states:

> 15. Attached as Exhibit "E" is a copy of a recent online news article about ABCO.

[29] Exhibit "E" appears to be a 2018 Global News article which mentions ABCO in the context of a report of a contract to build landing craft for the Royal Canadian Navy. ABCO says that the newspaper article is hearsay. Mr. Officer has no personal knowledge of this article; he certainly does not say that he does. Mr. Norman also advised that his counsel was prepared to withdrawn Exhibit "E." Exhibit "E" constitutes hearsay and is struck.

[30] ABCO also objects to a statement in paragraph 6 of the Affidavit of Wayne Officer, sworn in California in July 2019. Wayne Officer describes himself in his Affidavit as the "proprietor of Septic Solutions." He states that Septic Solutions is a sole proprietorship which he operates. Wayne Officer states in paragraph 6:

> 6. In recent months, Septic Pumping Services (of which I am a director and officer) and I have attempted to borrow $40,000.00 in order to pay legal fees and other costs associated with this litigation. We have been rejected from lenders who have indicated that we are overleveraged. They have not agreed to lend us money. We tried to borrow money through Septic Pumping Services and I tried to borrow money personally – both from U.S. Bank, with whom we banked. Attached as Exhibit "B" is a copy of one of the rejection letters from U.S. Bank.

[31] ABCO objects to the part of the sentence, "We have been rejected from lenders who have indicated that we are overleveraged." ABCO's counsel says that this portion is inadmissible hearsay because it is an out-of-court statement being relied upon for its truth, for which Mr. Officer does not state his belief in the source, nor provide the identity of the individual who provided him with this information. Mr. Norman advised that his client agreed to withdraw the impugned portion of paragraph 6. If he had not so advised, this Court would have struck it on the basis that it is inadmissible hearsay.

ABCO's Position - Why Security for Costs Should be Ordered

[32] ABCO says that it will have undue difficulty recovering on a judgment for costs in the event that the Application in Court is successfully contested. It says that it should have some protection for costs in the event it is successful in this litigation.

[33] ABCO points out that the moving party must establish four factors under *Rule* 45.02(1), each of which it says have been met by it on this motion.

[34] First, the party who makes a motion for the order has filed a notice by which the claim is defended or contested (*Rule* 45.02(1)(a)). That part of the test has clearly been met, as ABCO has filed a Notice of Contest to the Application in Court.

[35] Secondly, *Rule* 45.02(1)(b) provides that the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party. Counsel for ABCO says this element of the test is met by virtue of the fact that all three Applicants are based in California and one of the Applicants is a nominal company, not appearing to have assets.

[36] Thirdly, *Rule* 45.02(1)(c) provides that the undue difficulty does not arise only from the lack of means of the party making the claim. ABCO's counsel submits that the undue difficulty does not arise only from the lack of means of the Applicants. ABCO says that this element is met because the Applicants are out of the jurisdiction, out of reach of this Court, and therefore it is not solely the lack of means of the Applicants which causes undue difficulty realizing on a judgment for costs.

[37] Fourthly, *Rule* 45.02(1d) provides that in all of the circumstances, it is unfair for the claim to continue without an order for security for costs.

[38] Counsel for ABCO points out that *Rule* 45.02(3) then lists a series of factors, that if proven, give rise to the rebuttal presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means.

[39] Saunders J.A. in *Ellph.com Inc. v. Aliant*, (*supra*), outlined the necessary analysis once a rebuttable presumption under *Rule* 45.02(3) is established:

> [63] … *CPR* 45.02(1)(c) says that a prerequisite to any security is that the difficulty "does not arise only from the lack of means of the party making the claim". We know from Ellph.com's factum (quoted above) their admission that their companies "are insolvent . . . (and) . . . will not be in a position to contribute to Aliant's costs". On its face, therefore, the difficulty does "arise only from the lack of means of the party making the claim" which would then suggest that security is unavailable because of the wording of 45.02(1)(c). However, that conclusion is neutered by *CPR* 45.02(3)(c) which says that when the plaintiff is a corporation there is a rebuttable presumption that the difficulty does not arise solely from the plaintiff's lack of means. Ellph.com could have sought to rebut the presumption but, with its concession, chose not to do so. Accordingly, *CPR*

> 45.02(1)(c) is satisfied and we are left with 45.02(1)(d) – unfairness – as the only issue.
>
> [emphasis of the Court of Appeal]

[40] ABCO says that the rebuttal presumption is clearly engaged by two of the factors, i.e., the first being that all three Applicants are normally resident outside of Nova Scotia (*Rule* 45.02(3)(a)) and that this element has been established by the evidence before the Court. ABCO says that the policy rationale for this presumption, as stated by Mark Orkin, in *The Law of Costs*, 2nd ed. (Thomson Reuters: Toronto) 2018, 503.1(1) is:

> Subject to certain exceptions, a plaintiff who resides outside the jurisdiction will usually be ordered to give security for the defendant's costs of the action, for the reason that if a verdict be given against the plaintiff he is not within the reach of our law to have process served upon him for the costs. Non-residency alone is sufficient to trigger consideration of the appropriateness of an order for security for costs….
>
> [emphasis added]

[41] ABCO says that on this basis alone, the presumption built into the Rules, is therefore engaged.

[42] ABCO notes that the Applicants' assertion in their pre-motion brief states, "The bare assertion that it would be difficult to enforce a judgment in California is not a basis for this Court to order security for costs: *6048668 Canada Inc. v. Chaston*, 2007 NSSC 91 at para. 18." Counsel for ABCO correctly points out that *Chaston* was decided under the old *Rules*, which did not include a presumption in favour of security for costs, as found in current *Rule* 45.02(3)(a). In *Chaston*, the Court appears to have accepted that a Nova Scotia costs award could be easily enforced in Quebec or Ontario, with the Court considering reciprocal enforcement of judgment legislation.

[43] Counsel for ABCO notes that the Applicants attach a piece of legislation from California to their pre-motion brief, the "2013 California Code, Code of Civil Procedure" with the intent to suggest that any award of costs to ABCO could be easily enforced. ABCO says that this excerpt of Californian legislation does not mean that an award of costs could be easily enforced in California. It says that ABCO, if successful in defending the merits of the Application, would still be required to apply to a California Court to start an action in order to have the order domiciled in that State. In support of these arguments, counsel for ABCO provided a copy of another provision from the California Code of Civil Procedure

1718 entitled, "Procedure for recognition of foreign-country judgment" which reads that if recognition of a foreign-country judgment is sought as an original matter, the issue of recognition "shall be raised by filing an action seeking recognition of the foreign-country judgment." Counsel for ABCO says that this appears to mean that an action must be filed in order for the California Court to recognize the judgment, before the judgment can be enforced.

[44] The second rebuttal presumption relied on by ABCO is based on *Rule* 45.02(3)(c), i.e., that "the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful."

[45] The evidence on the motion establishes that the Applicants have no assets in Nova Scotia. Counsel for ABCO says that it is clear from the Affidavits of Nathan Officer and Wayne Officer that the financial positions of the Applicants are not good. Their counsel says in his pre-motion brief that they are impecunious. Nathan Officer states in his Affidavit that Septic Pumping Services has never made any profit since it was created in 2014 and that the Applicants are unable to make more than interest payments on their home equity line of credit. Wayne Officer states in his Affidavit that when the MDT was purchased from ABCO, his family borrowed $380,000 to fund the purchase and this loan was secured by a mortgage against his personal home, located in California.

[46] ABCO says that given this evidence, and the submissions of the Applicants' counsel, it will have undue difficulty realizing on a judgment for costs if it successfully defends the Application.

[47] In order to rebut the *Rule* 45.02(3)(a) and (c) presumptions, the burden is on the Respondents to satisfy the Court that the undue difficulty to realize on an award of costs does not arise solely through their lack of means.

[48] ABCO, of course, says both jurisdiction and lack of means are rebuttable presumptions in this case.

[49] Counsel for ABCO refers to the decision of Wood J. (as he then was) in *Armoyan v. Armoyan*, 2014 NSSC 117. In that case Wood J. considered circumstances where undue difficulty did not arise only due to lack of means - he stated at para. 13:

> *Civil Procedure Rule* 45.02(1) provides that if all of the criteria listed in that rule have been established, a judge may order that security be provided. Criteria (a)

> has been met, as has criteria (b), by virtue of the presumption raised by ss.3(a). In my view, criteria (c) has also been met because the undue difficulty does not arise simply from Ms. Armoyan's financial situation, but also because of her residing outside of Nova Scotia.

[50] ABCO says that the same applies in the within case, where the undue difficulty does not arise solely from the Applicants' financial position, but also because they are ordinarily resident outside the jurisdiction. Accordingly, ABCO says that since the presumption set out in *Rule* 45.02(3) is engaged, as they say it is here, this covers the criteria found in *Rule* 42.02(1)(b) and (c).

[51] In terms of impecuniosity, ABCO says that the evidence before the Court is insufficient to rebut the presumption against the Applicants. ABCO refers to the case law which provides that there must be more than a blanket or empty assertion of impecuniosity. Relying on that case law, counsel for ABCO says that impecuniosity must be supported by detailed evidence of a party's financial position, including income, assets and liability as well as capacity to raise security from any source.

[52] The motion decision in *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316 was decided by Moir J. In terms of establishing impecuniosity, Moir J. stated at para. 19, referring to the decision of then Associate Chief Justice Deborah K. Smith in *Emmanuel v. Sampson Enterprises Ltd.*, (*supra*), at para. 9:

> (4) Where impecuniosity is relied upon to defend against an Order for security for costs there must be more than a "blanket and empty assertion of impecuniosity." A Plaintiff who alleges impecuniosity and who suggests that an Order for security for costs will stifle the action must establish this by detailed evidence of its financial position including not only its income, assets and liabilities, but also its capacity to raise security.
>
> [emphasis added]

[53] ABCO also refers to the decision of the Ontario Court of Appeal in *Yaiguaje v. Chevron Corporation*, 2017 ONCA 741 where Epstein J.A. considered what appears to be a similar civil procedure rule in that Province dealing with security for costs:

> **Impecuniosity**
>
> [30] A party who seeks to establish impecuniosity must lead evidence of "robust particularity", with full and frank disclosure, and supporting documentation as to income, expenses and liability: *T.S. v. Publishing Group Inc. v. Shokar*, 2013 ONSC 1755 (Master) *Mapara v. Canada (Attorney General)*,

2016 FCA 305, at para. 8 Doherty J. (as he then was) explained the rationale for this evidentiary rule in *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (Ont. H.C.), at pp. 9-10:

> A litigant who falls within one of the categories create by rule 56.01(a) to (f), and who relies on this impecuniosity to avoid an order requiring that he post security, must do more than adduce some evidence of impecuniosity. The onus rests on him to satisfy the court that he is impecunious…The onus rests on the party relying on impecuniosity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniosity as a shield against an order as to security for costs.

[emphasis added]

[54] ABCO also refers this Court to the decision of Penny J. in *Elias v. Hawa*, 2018 ONSC 5703. In that case the Court considered a motion for security for costs. The Plaintiff resided in California and had no assets in Ontario. He claimed impecuniosity. At para. 19 Penny J. stated:

> [19] The evidentiary threshold to demonstrate impecuniosity is high. Bald statements unsupported by detail are not sufficient. The threshold can only be reached by tendering complete and accurate disclosure the applicant's income, assets, expenses and liabilities and borrowing ability: *Coastline Corp. v. Canaccord Capital Corp.*, 2009 CanLII 21758 (Ont. S.C.). The court must be satisfied on the evidence provided that the responding party on the motion has no ability to muster funding to continue with the proceeding: *Weidenfield v. Weidenfield Estate*, 2017 ONSC 1275, at para. 18.

[emphasis added]

[55] ABCO also refers to *Wall v. Abbot* (1999), 176 NSR (2d) 96 (NSCA) where Cromwell J.A., as he then was, stated:

> [83] …If the plaintiff resists security that would otherwise be ordered on the basis that the order will stifle the action, the plaintiff must establish this by detailed evidence of its financial position including not only its income, assets and liability, but also its capacity to raise the security.

Evidence Before the Court as to Impecuniosity

[56] There are three Applicants. Paragraph 9 of Nathan Officer's Affidavit, sworn December 4, 2018 states, "All three Applicants are part of the family business. They work together, share resources, and act as a joint venture."

[57] In oral submissions before this Court, counsel for ABCO reviewed the evidence which was before the Court relating to the financial status of the Applicants, as well as the evidence not before the Court as to their financial status.

[58] Nathan Officer's Affidavit sworn July 8, 2019 attaches as an exhibit a copy of the 2017 tax return for Septic Pumping Services. The same affidavit attaches as an exhibit a credit card account statement as of July 1, 2019. Nathan Officer states that "We maxed the card out again two months ago." Counsel for ABCO in the body of his Affidavit notes that neither the Affidavit, nor the account summary identifies the name of the credit card holder. Nor does the account summary provide that the credit card has been "maxed out."

[59] Nathan Officer states in his Affidavit of July 8, 2019 that he has a personal net monthly income of $3,175 and that his work as Sunland Sewer averages about $10,000 to $15,000 net profit per year. That amounts to net yearly income or profit for Nathan Officer of between $48,100 and $53,100.

[60] The Affidavit of Wayne Officer attaches as an exhibit a letter from U.S. Bank to Septic Pumping Services dated May 15, 2019 which states that "we are unable to extend credit to you at this time for the following reasons: "Application does not meet minimum credit guidelines, delinquent past or present obligations with others and insufficient credit experience." In the body of his Affidavit, Wayne Officer refers to this letter as one of the rejection letters in which US Bank declined to loan money to Septic Pumping Services.

[61] Mr. Wayne Officer also states in his Affidavit that Septic Solutions, his sole proprietorship, completed "its largest ever contract. It received $100,000.00 in profit. This money was deposited in a bank account by me. In the last two and a half months, $70,000.00 of this money has gone to try to keep Septic Pumping Services afloat." Wayne Officer goes on to state in his Affidavit that Septic Solutions has transferred money to Septic Pumping Services for various payments, including legal fees, as a result of the financial situation of that company.

The Evidence Not Before the Court in the Affidavits of Nathan and Wayne Officer

[62] Counsel for ABCO points out that there are no bank statements or bank account records for either Nathan or Wayne Officer.

[63] No personal income tax returns have been provided for Nathan or Wayne Officer, nor tax returns for their sole proprietorships, Septic Solutions and Sunland Sewer Company.

[64] No investment records for either Nathan or Wayne Officer or their sole proprietorships have been produced.

[65] There is no monthly budget of income or expenses for Nathan or Wayne Officer or their sole proprietorships.

[66] There is no listing of the assets of Wayne or Nathan Officer, or of their sole proprietorships.

[67] There is no 2018 tax return for Septic Pumping Services.

[68] There are no letters of credit from U.S. Bank, or any other financial institution.

[69] There are no credit scores for Nathan or Wayne Officer or either of their sole proprietorships.

[70] Because there is no listing of assets, there is no information as to whether Nathan or Wayne Officer attempted to sell any of these assets.

[71] There is no indication in either affidavit that Nathan or Wayne Officer is personally insolvent or soon to be personally insolvent.

[72] In his Affidavit, Wayne Officer states that he deposited $100,000 in "a bank account in January 2019." No particulars of this bank account is in evidence before this Court. There is no evidence before the Court as to how much money is currently in this bank account, Wayne Officer's annual income or net worth.

[73] It is Wayne Officer, through his sole proprietorship, Septic Solutions, who is the actual owner of the MDT. This is shown on the bill of sale for the purchase of the MDT, an exhibit to Wayne Officer's Affidavit, sworn in December 4, 2018.

[74] Counsel for ABCO notes that the Applicants have stated that the employees of Septic Pumping Services are paid through Septic Solutions, Wayne Officer's

sole proprietorship. There is no evidence before the Court concerning the financial position of Septic Solutions.

[75] Further, counsel for ABCO submits there is no indication in either the Affidavit of Nathan or Wayne Officer of a shareholder loan of $192,812 which is shown on the 2017 tax return of Septic Pumping Services. A Shareholder loan of $192,812 is listed. There are four shareholders in the Company, Wayne Officer and his spouse and Nathan Officer and his spouse. It is clear that one of these individuals loaned Septic Pumping Services close to $200,000.

[76] Counsel for ABCO submits that the procedural history of the proceeding suggests that the Applicants do have the means to continue with the litigation. In that regard, this Court notes that the Applicants brought a motion for an order for a discovery subpoena of a non-party which was heard on the morning of the day the motion for security for costs was heard. The motion was dismissed with costs payable to ABCO. The Applicants also brought a motion for production which was heard by this Court on January 31, 2019. The Applicants were substantially successful on that motion and were awarded costs.

[77] Counsel for ABCO notes that the Applicants have filed substantial affidavits on the merits on the Application in Court. ABCO's counsel says that the Applicants appear not to lack resources when required to advance their positions in the litigation.

[78] ABCO says that the only information it is privy to concerning the Applicants' financial circumstances (counsel advised that no discoveries had been conducted prior to the hearing of this motion) is the information contained in the Affidavits of Nathan and Wayne Officer.

[79] *Rule* 45.02(1)(d) is the final consideration on a motion for security for costs. Security for costs is a discretionary matter. *Rule* 45.02(1) engages the Court's discretion to do what is fair in all of the circumstances. This Court must determine whether "in all of the circumstances, it is unfair for the claim to continue without an order for security for costs."

[80] ABCO submits that a consideration of the circumstances of this particular case leads to the conclusion that it would be unfair for the claim to continue without an order for security for costs against the Applicants.

[81] ABCO says that it did not cause the alleged impecuniosity. ABCO points to the following statements in Nathan Officer's December 2018 Affidavit where he swore:

> 245. Because the technology of the MDT was not well known and the costs of the truck was extremely high, Septic Pumping was forced to get financing through a third-party lending institution with an interest rate of 21%. This was especially crippling when we had breakdowns because the cost of the loan was a $4,499/month for five years on a loan amount of approximately $160,000 USD. This also does not include the $250,000 USD home equity line of credit ("HELOC") that is separate and was used to procure the truck.
>
> [emphasis added]

[82] ABCO says that it is not responsible for the business and financial decisions made by the Applicants relating to the purchase of the MDT. The evidence before the Court shows that the parties negotiated the purchase price.

[83] In terms of the merits of the Applicants' claim, counsel for ABCO notes that the Applicants' counsel in his submissions to the Court on the motion, refers to expert evidence in support of the merits of the claim which at the hearing of the motion had not been filed.

[84] Finally, on the fairness consideration, ABCO says that there has been no delay on its part in bringing the security for costs motion. It notes that it brought the motion before discovery examinations and before the filing of expert reports. There is an inspection pursuant to *Rule* 17 which had not occurred as of the hearing of the motion.

[85] ABCO says that an appropriate amount for this Court to award as security for costs is the sum of $42,750 which it says could be paid in installments.

[86] It quantifies this amount by applying the "amount involved" under Tariff A. Since the Applicants seek damages for breach of contract and recision relating to the purchase of the MDT for $370,000, they say that that sum is the "amount involved." Applying that amount to Scale 2 yields an amount of $34,750. The trial is scheduled for four days. Adding $8,000 ($2,000 per day of trial) to $34,750 amounts to the $42,750 claimed.

The Arguments of the Applicants as to why Security for Costs should not be Ordered

[87] Counsel for the Applicants says that the three Applicants run a small family business for which an expensive piece of equipment was purchased from ABCO. The MDT, he says, did not operate in a manner which ABCO's representatives said it would and this has caused the Applicants a significant amount of financial distress and has resulted in damages. Counsel says that his clients are under very severe financial pressure as a result.

[88] The Applicants rely upon the decision of the Nova Scotia Court of Appeal in *Aliant Inc. v. Ellph.com Solutions Inc.,* (*supra*) as an example of the court's reluctance to order security for costs if doing so would effectively end the action. In that case, Ellph.com sued Aliant for breach of contract. Aliant brought a motion for security for costs, requesting security of $1.5 million. Since Ellph.com was an insolvent corporation, the first three criteria in *Rule* 45.02(1) were met. The only remaining issue was whether it would be fair "in all the circumstances" to continue the action without ordering security for costs. The directors of Ellph.com gave detailed affidavits stating that they would be bankrupt should they be required to post security in any amount.

[89] Saunders J.A. upheld Moir J's decision in the court below not to exercise his discretion to award security for costs. Saunders J.A. stated at paras. 87-88:

> [87] I also find it interesting that in his reasons in *Terra Energy Ltd.*, (*supra*), [*Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.*, [1995] A.J. No. 1159 (Q. L.) Q.B.] Hart, J.A., referred with approval to an earlier decision cited by the parties against whom security was sought. He said:
>
> > [57] On the other hand, it is equally clear that an order for security for costs should not be oppressive, such as to limit or restrict access to the Court by a party who is unable to comply. As stated by Mr. Justice Reid of the Ontario High court in the case of John Wink Limited, quoted by defendants at page 6 of the written brief of the respondent, quote:
> >
> > > There can be no question that an injustice would result if a meritorious claim were prevented from reaching trial because of the poverty of a plaintiff. If the consequences of an order for costs would be to destroy such a claim no order should be made and injustice would be even more manifest if the impoverishment of the plaintiff were caused by the very acts of which plaintiff complains in the action.
>
> [88] That is precisely the conclusion reached by Justice Moir here. He found, on the evidence, that to force Messrs. Kelly and Barnes to put up the security demanded by Aliant would be to "destroy" their claim to damages and that such a

> grave injustice "would be even more manifest" if their impoverishment were later found to have been caused by the very acts of which the respondents complain.

[90] However, this Court notes that there was extensive financial information filed by the Ellph.com Plaintiffs. This is evident from the following passages in the Court of Appeal's decision:

> [71] …In opposing Aliant's motion Andrew Barnes and Cameron Kelly filed detailed affidavits to which were attached extensive exhibits….In his affidavit, Mr. Barnes gave a complete account of his income, assets, liabilities and debt which showed him to have a net worth of slightly more than $4000.
>
> …
>
> [74] The uncontradicted evidence established that these two men have a combined net worth of less than $37,000.

[91] The Applicants also rely upon the decision of Chipman J. of this Court in *Quadrangle Holdings Ltd. v. Coady Estate*, 2018 NSSC 349 where Justice Chipman stated:

> [10] On the question of Quadrangle's impecuniosity, I am satisfied from Dr. Findlay's unchallenged evidence that the company has limited assets. In particular, I refer to paras. 13 to 17 of his filed affidavit. Indeed, I see many parallels between this case and Ellph.com on the facts. To my mind, were I to grant the motion, there would be a denial of access to justice and the Plaintiff would be impossibly stretched to come up with hundreds of thousands of dollars to continue with the litigation.
>
> …
>
> [14]…I see absolutely no merit in ordering an impecunious Plaintiff to pay into Court in excess of a quarter of a million dollars as security for costs. To do so might well deprive the Plaintiff of their right to a trial, such that they would be denied access to justice. When I consider our Court of Appeal authority as against the backdrop of the Supreme Court of Canada's pronouncements in *Hyrniak*, [*Hyrniak v. Mauldin*, [2014] 1 SCR 87] I cannot think this would be a just result.

[92] The Applicants provided this Court with Chipman J.'s unreported decision and the transcript of the motion before him (as approved by Justice Chipman). It is clear that Chipman J. had a significant amount of detailed financial information about Quadrangle. This Court refers to page 30 of the transcript (lines 15 to 22 where then Mr. John Keith (now Justice Keith) referred to the Affidavit of Dr. Finlay and noted):

> …I refer the Court specifically to Tabs A and B, of Dr. Finlay's affidavit. Those are the account statements showing that what is in Quadrangle's accounts. (A) shows an account value of about $26,000, a net portfolio value.

[93] This Court also notes that in *Quadrangle Holdings* Dr. Finlay stated in his Affidavit why he did not produce financial statements for the company. Dr. Finlay did, however, produce letters of credit and statements from the letter of credit (page 31, lines 15 – 23). There was also evidence before the Court in *Quadrangle Holdings* as to the company's assets. This is evident from page 32 of the transcript of the hearing of the motion.

[94] Counsel for the Applicant says that the evidence reveals that ABCO is a mid-sized company in Nova Scotia with 50 to 65 employees. He says that the profile of ABCO versus his client's business is very different – a small family business versus a mid-sized company.

[95] Counsel for the Applicants says that the evidence shows that the Applicants have borrowed money to pay their own legal fees, which he suggests means that they do not have the money on hand to do so without borrowing. He says that the evidence shows that each of the three Applicants has tried to borrow money in the last few months in order to continue with the litigation and have been unable to secure loans.

[96] The Applicants say that they are impecunious and therefore do not have the resources to put up the security proposed by ABCO.

[97] Counsel for the Applicants says that the main evidence which this Court should consider in determining the financial capability of his clients is their borrowing efforts. He says that the evidence before the Court shows that each of the three Applicants has tried to borrow money in the last few months and in each case has been rejected. Counsel points out that there is corroborating evidence for Septic Pumping Services' rejection, which provides reasons by U.S. Bank, their main lender.

[98] In terms of the $200,000 loan to Septic Pumping Services identified in that company's 2017 tax return, counsel says that this loan was made by Wayne Officer and is consistent with Wayne Officer's Affidavit evidence that he has been pouring money into Septic Pumping Services and has tried to borrow money himself, but has been rejected. Counsel says that that is evidence that the resources are not there for the Applicants to pay security for costs. Counsel says that

Nathan Officer's evidence is that their credit cards are maxed out and that they used the cards to pay their legal fees.

[99] The Applicants say that their difficulty in borrowing in this case is key. The suggestion is that a litigant would not borrow, if it had money on hand to be used.

[100] The Applicants also say that ABCO has delayed in bringing its motion for security for costs. They say that ABCO was well aware of the financial distress they were suffering even before the Application in Court was commenced (in April 2018). Counsel refers to a letter sent by Nathan Officer to ABCO dated February 27, 2018 wherein he states, in part:

> Over the last 12 months we have thoroughly vetted all avenues to mitigate our losses from the MDT now we are forced to pursue financial recourse. Our family's livelihood and home are at risk of being taken from us due to the ABCO MDT failures, and the truck is completely incapable of operating as ABCO has advertised. We continue to dig ourselves deeper into debt every month the truck stays in service.

[101] Counsel for the Applicants says that 15 months after this letter, ABCO now seeks security for its costs. He says that discovery examinations originally scheduled for June 2019 have been delayed and that one of the reasons for that was because of the security for costs motion.

[102] Counsel says that ABCO knew everything it needed to know about his client's financial difficulties a "long time ago" and the time to make the security for costs motion was soon after the Application was filed. Counsel says that that is another fairness factor which the Court should consider on this motion.

[103] The Applicants' counsel refers to *Rule* 45.02(2) which provides:

> The judge who determines whether the difficulty of realization would be under must consider whether the amount of the potential costs would justify the expense of realizing on the judgment for costs, such as the expense of reciprocal enforcement in a jurisdiction where the party making the claim has assets.

[104] Counsel points out that California does have a reciprocal enforcement mechanism, whereas some countries or jurisdictions do not have such a mechanism. Where there is no mechanism to enforce a foreign judgment, then doing so is difficult, if possible at all. Counsel says that California has a process for enforcing a foreign judgment which appears to be very similar to other provinces in Canada, i.e., a reciprocal enforcement proceeding has to be

commenced to have the judgment recognized. He says that the amount of security ABCO seeks (nearly $43,000) is substantial enough to provide ABCO with an incentive to start a reciprocal enforcement proceeding in California, and if successful in having the judgment recognized, presumably recovering its costs.

[105] In terms of the Applicants being outside the jurisdiction, counsel says that the presumption of undue difficulty is rebutted for two reasons. First, he says that there is a reciprocal enforcement mechanism in California and the amount of costs sought makes it worthwhile for ABCO to proceed; and (2) the Applicants have presented evidence to show that the difficulty would be because of their lack of means.

[106] Counsel for the Applicants says that, therefore the evidence before the Court shows that any undue difficulty in realizing on a judgment for costs is because of the Applicants' lack of means.

[107] Finally, counsel says that the Court should look at the fairness and conclude based on the record before the Court, that an order of security for costs should not be paid. The Applicants say that doing so would foreclose their claim. Counsel emphasizes the Applicants tried to borrow money to prosecute this claim and have been unable to do so.

Analysis

[108] In deciding this motion, I have carefully considered the competing arguments of counsel. I have also reviewed the *Rule* and the guiding cases, particularly *Ellph.com Solutions Inc. v. Aliant Inc.*, and Justice Saunders' guidance beginning at para. 38.

***Rule* 45.02(1)(a) – Has a defence been filed?**

[109] ABCO has filed a Notice of Contest. This part of the test has clearly been met.

***Rule* 45.02(1)(b) – Will ABCO have undue difficulty in realizing upon an award of costs, and (c) Does the undue difficulty arise only from a lack of means of the party making the claim?**

[110] *Rule* 45.02(1)(b) and (c) must be read in tandem with *Rule* 45.02(3) which I will repeat here for ease of reference:

> 45.02(3) Proof of one of the following facts gives rise to a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the claiming party's lack of means:
>
> (a) the party making the claim is ordinarily resident outside Nova Scotia;
>
> (b) the party claimed against has an unsatisfied judgment for costs in a proceeding in Nova Scotia or elsewhere;
>
> (c) the party making the claim is a nominal party, or a corporation, not appearing to have sufficient assets to satisfy a judgment for costs if the defence or contest is successful;
>
> (d) the party making the claim fails to designate an address for delivery or fails to maintain the address as required by Rule 31 – Notice.
>
> [emphasis added]

[111] *Rule* 45.02(3)(a) clearly applies to each of the three Applicants. On the evidence before the Court, *Rule* 45.02(3)(a) and (c) also clearly apply.

[112] The Applicants contend that the presumption of undue difficulty is rebutted for two reasons. Firstly, because there is a reciprocal enforcement mechanism in California and the amount of costs sought by ABCO makes it worthwhile for ABCO to proceed to enforce a costs award, a consideration the Court must consider – *Rule* 45.02(2). Secondly, the Applicants say they have presented evidence to show that the difficulty would be solely because of their lack of means.

[113] However, merely because there is an enforcement process in California to recognize a Nova Scotia judgment and it would be worthwhile financially for ABCO to avail itself of such a process is not, in this Court's view, sufficient to rebut the *Rule* 45.03(a) presumption. In addition, as noted later in this decision, the Applicants have not established through evidence that their lack of means is the only reason for the undue difficulty in realizing on a costs award.

[114] The Applicants may rebut the presumption of undue difficulty by, in the words of ACJ Smith (as she then was) in *Ocean v. Economical Mutual Insurance Company*, 2011 NSSC 408, providing "detailed evidence of [their] financial position including not only [their] income, assets and liabilities, but also [with respect to their] capacity to raise security."

[115] Neither Wayne nor Nathan Officer was cross-examined on their affidavits. However, it must be emphasized that the burden is on the Applicants to show impecuniosity. Their financial capabilities are within their knowledge and are not known to ABCO, to track the wording of Doherty J. (as he then was) in *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (Ont. H.C.) which was cited with approval by the Ontario Court of Appeal in *Yaiguaje v. Chevron Corporation* (*supra*).

[116] The evidence before the Court is insufficient to rebut the presumption that ABCO will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from the Applicants' lack of means.

[117] The case law abundantly establishes that impecuniosity must be supported by detailed evidence of a party's financial position, including income, assets and liability as well as the capacity to raise security.

[118] The details of the Applicants' financial capabilities are within their knowledge alone. Nathan Officer attached a 2017 tax return for Septic Pumping Services to his Affidavit. He did not attach a 2018 tax return for that company.

[119] Nathan Officer states in his Affidavit that "We maxed the [credit] card out again two months ago." His Affidavit attaches as an exhibit a credit card "2019 Annual Account Summary as of July 1, 2019." Neither his Affidavit, nor the account summary identifies the name of the credit card holder. Nor does the account summary provide that the credit card has been "maxed out." The summary does show that the credit card was used to pay legal fees, but those fees are only about 25 per cent of the total owing on the card of approximately $20,000. There were no cash advances on the card. The summary shows travel and related services for the period as $2,756.76. The purpose for the travel, including $312.20 for taxicabs and limousines is not identified; nor is there an explanation in Mr. Officer's Affidavit of the reason $573.25 was incurred under the category "Travel Agencies and Tour Operators."

[120] Nathan Officer's Affidavit confirms net monthly income of $3,175 as well as net annual profit for Sunland Sewer of between $10,000 to $15,000. That amounts to net yearly income or profit for Nathan Officer of between $48,100 and $53,100.

[121] The letter from U.S. Bank attached as an exhibit to Wayne Officer's Affidavit provides that "We are unable to extend credit to you at this time," for

several reasons including, "delinquent past or present obligations with others and insufficient credit experience." No further details are provided in this letter, or in Wayne Officer's Affidavit, elaborating upon what circumstances support these reasons, including a more detailed explanation from a representative of U.S. Bank. In the body of his Affidavit, Wayne Officer refers to this letter as one of the rejection letters in which U.S. Bank declined to loan money to Septic Pumping Services, but none of these other letters are before the Court.

[122] Nathan Officer's Affidavit provides that he and his father "recently attempted to borrow money from lenders to continue with this litigation. We were rejected three times. We were rejected by U.S. Bank twice – once with Septic Pumping applying and the other time with my father Wayne applying."

[123] Neither these applications and rejections, nor the reasons for the rejections are in evidence, with the exception of U.S. Bank's "rejection letter" in May 2019.

[124] No bank statements or bank account records were provided by either Wayne or Nathan Officer. No personal income tax returns for them or their sole proprietorships have been produced. No monthly budget of income or expenses for Nathan or Wayne Officer or their sole proprietorships are before the Court. Nor is there a listing of the assets of Wayne or Nathan Officer or their sole proprietorships. There are no credit scores for Wayne or Nathan Officer or their sole proprietorships. There are no particulars of the bank account where Nathan Officer says he deposited $100,000 in January 2019. There is no evidence before the Court as to how much money is currently in this account.

[125] There is no evidence as to Wayne Officers' annual income or net worth. Nor is there any evidence before the Court as to the financial position of Septic Solutions.

[126] Counsel for the Applicants advised that Wayne Officer made a $192,812 shareholder loan to Septic Pumping Services (shown on that company's 2017 tax return). While counsel describes this as part of Wayne Officers' continued pumping of money into Septic Pumping, there is no evidence before the Court as to how Wayne Officer came up with the money advanced.

[127] This Court also notes that the Applicants have had the financial wherewithal to advance two separate motions before this Court – one in January 31, 2019 for production of documents, and a second motion for a third party discovery subpoena, heard on the same day as the within motion. The Applicants do not

appear to lack the resources to bring procedural motions to assist their positions in the litigation.

[128] Further, there is no evidence before the Court that either Nathan or Wayne Officer is personally insolvent or soon to be personally insolvent.

[129] The fact that U.S. Bank declined to advance a loan to Septic Pumping Services in May 2019 does not, in and of itself, establish impecuniosity of each of the Applicants. It is one piece of evidence this Court must consider. The reasons for the rejection include, "delinquent past or present obligations with others", but there is nothing in Wayne Officer's Affidavit which refers to delinquency in obligations to "others", nor is there evidence in Wayne Officer's Affidavit as to "insufficient credit experience" on the part of Septic Pumping Solutions. Surely, a more fulsome account of the reasons for rejection could have been obtained by Wayne Officer from a representative of U.S. Bank. As noted previously, there is no corroborating evidence before the Court as to the Applicants' other attempts to borrow, and the reasons they were declined.

[130] For all of these reasons, the Applicants have not rebutted the presumptions created by *Rule* 45.02(3). ABCO has established all of the criteria listed in *Rule* 45.02(1)(a), (b) and (c). Criteria 45.02(1)(b) has been met by virtue of the presumption raised by s-s. 3(a), which the Applicants have not rebutted. In my view, criteria (c) has also been met because the undue difficulty does not arise simply from the financial position of the Applicants, but also because they are resident outside of Nova Scotia.

***Rule* 45.02(1)(d) In all of the circumstances, is it unfair for the claim to continue without an order for security for costs?**

[131] On a motion for security for costs, the Court is tasked with doing what is fair in all of the circumstances.

[132] Firstly, I am <u>not</u> satisfied that the claim itself is the cause of the Applicants' alleged impecuniosity. The Applicants were well aware of the purchase price of the MDT, and Nathan Officer negotiated the sale price. The fact, as stated by Nathan Officer in his Affidavit, that the technology was not well known, and Septic Pumping was forced to get funding with an interest rate of 21 per cent, is not attributable to anything ABCO did or failed to do. Nor is ABCO responsible for the financial consequences of the Applicants' decision to fund the purchase of the MDT by a $250,000 USD home equity line of credit.

[133] I accept that the Applicants' claim, for the purpose of this motion only, has merit.

[134] This Court is not satisfied that an award for costs will stifle a legitimate claim. The circumstances before the Court do not present the kind of 'David and Goliath' battle present in *Aliant v. Ellph.com*. ABCO employs 60-65 employees. The Applicants together operate a small family business. The purchase price of the MDT was negotiated. ABCO is hardly an "Aliant" or "Goliath" in the circumstances.

[135] Nor do I accept that ABCO delayed bringing its motion. The motion was brought prior to discovery examinations and prior to a *Rule* 17 inspection.

[136] I am not convinced, as suggested by counsel for the Applicants, that ABCO knew that the Applicants were in such financial distress that it should have brought its motion soon after filing its Notice of Contest. The Applicants brought a motion for production in January 2019 and filed lengthy affidavits on the merits. Although Nathan Officer's February 27, 2018 email to ABCO (referred to earlier in this decision) referred to the family's livelihood and home being at risk, and the Applicants digging themselves into debt every month the truck stayed in service, that evidence of financial difficulty is belied by the costs of the procedural activity the Applicants have been willing to incur to date, in order to advance their positions in the litigation.

[137] In all of the circumstances, it would be unfair to ABCO to allow the proceeding to continue without security for costs being paid by the Applicants.

What Amount?

[138] *Rule* 45.03(1) provides:

> **Terms of Order**
>
> **45.03(1)** An order in security for costs must require the party making the claim to give security of a kind prescribed in the order, in an amount equal to or lower than that estimated for the potential award of costs, by a date stated in the order.
>
> [emphasis added]

[139] The word "estimated" means that determining the amount of a potential award of costs is not an exercise in precision. Then A.C.J. Smith stated, in this regard, in *Ocean v. Economical*, (*supra*):

> 53. Estimating a potential award for costs prior to trial can be difficult. As a preliminary matter, costs are in the discretion of the trial judge who, pursuant to *Civil Procedure Rule* 77.02(1), may make any order about costs that will "do justice" between the parties. It is almost impossible to know prior to the trial what costs order will accomplish that.

[140] The application of Tariff "A", Scale 2 to the figure of $370,000 (the purchase price of the MDT) yields a costs amount of $34,750. A four-day trial ($2,000 per day) would result in costs of $42,750. These calculations are premised on the trial judge using the purchase price of the MDT as the "amount involved." That is not a given.

[141] Clearly, this Court must not award an amount for security which is greater than the projected actual amount. Also very clearly, the Court has significant latitude in determining the estimated amount.

[142] In coming to an amount, I do take into account that there is evidence before the Court that the Applicants are not operating businesses which are particularly profitable.

[143] I conclude that the sum of $25,000 as security is appropriate and shall be posted by the Applicants.

[144] That sum may be paid in installments, but the total amount must be posted with this Court on or before April 30, 2020.

Conclusion

[145] The Applicants shall pay security for costs, in the amount, and by the date noted earlier.

[146] ABCO is entitled to its costs in responding to the motion. If the parties cannot agree on costs, I will receive written submissions within 30 calendar days of the date of this decision.

Smith, J.