SUPREME COURT OF NOVA SCOTIA

Citation: *International Royalty Corporation v Newmont Canada Corporation* 2023 NSSC 181

Date: 20230609
Docket: *Halifax* No. 508374
Registry: Halifax

Between:

International Royalty Corporation, a body corporate

Plaintiff

v.

Newmont Canada Corporation, a body corporate, Newmont Corporation, a body corporate, Newmont Canada FN Holdings ULC, a body corporate, St. Andrew Goldfields Ltd., a body corporate, Kirkland Lake Gold LTD., a body corporate, and Kirkland Lake Gold Inc., a body corporate,

Defendants

DECISION

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 22 and 23, 2023, in Halifax, Nova Scotia
Counsel:	Michelle Awad, K.C, Gordon Capern, Ren Bucholz, and Randy Shefman, for the Plaintiff
	W.H. Thurlow, Stephanie Voudouris and Chelsea Barkhouse, for the Defendants, Kirkland Lake Gold Inc., St. Andrew Goldfields LTD, and Kirkland Lake Gold Ltd.
	Nasha Nijhawan, for the Defendants, Newmont Canada Corporation, Newmont Corporation, and Newmont Canada FN Holdings ULC

By the Court:

Introduction

[1] This is a decision on costs following a successful motion for summary judgment on the pleadings brought by Kirkland Lake Gold Ltd., Kirkland Lake Gold Inc., and St. Andrew Goldfields Ltd. (collectively, the "Kirkland Defendants").

[2] The Plaintiff, International Royalty Corporation ("IRC"), alleged that the Kirkland Defendants, working in concert with Newmont Canada Corporation, Newmont Corporation, and Newmont Canada FN Holdings ULC (collectively, the "Newmont Defendants") engaged in oppressive conduct in relation to the operation of the Holt-McDermott mine located in Ontario (the "Holt Mine"). The Holt Mine is owned by St. Andrew Goldfields Ltd. ("St. Andrew") and is the subject of a 2004 royalty agreement (the "Royalty Agreement") under which Newmont Corporation owes certain royalty obligations to IRC. The operation of the Holt Mine has been suspended since April 2020. IRC alleged that the Newmont Defendants induced the Kirkland Defendants to agree to shut the Holt Mine, depriving IRC of future royalty payments in the amount of $350 million.

[3] The Kirkland Defendants brought a motion to: (1) strike the plaintiff's claim against them on the basis that it was clearly unsustainable; or (2) dismiss or stay the action on the basis that the court has no subject-matter jurisdiction, territorial jurisdiction, and/or that Ontario is the more convenient forum. The motion was brought under Civil Procedure Rules 13.03 and 4.07(1). In my decision (2022 NSSC 280), I concluded that it was plain and obvious that IRC's oppression claim against the Kirkland Defendants could not succeed and granted summary judgment on the pleadings. It was unnecessary in the circumstances to consider the Kirkland Defendants' alternative grounds for dismissal.

[4] The parties were unable to reach agreement on costs leaving it to the court to decide the issue.

The positions of the parties

[5] The Kirkland Defendants say they have incurred legal expenses in the amount of $232,442.79 inclusive of fees, disbursements, and HST in relation to this matter. They submit that, given the size and nature of IRC's claim, an award under Tariff C will not amount to a "substantial contribution" toward their actual legal costs. In other words, reliance on the tariffs in these circumstances will not achieve the overall mandate of a costs award, which is to do justice between the parties (Rule 77.02(1);

Armoyan v. Armoyan, 2013 NSCA 136 at para. 10). According to the Kirkland Defendants, justice between the parties in this case can only be achieved by a lump sum costs award in the amount of $115,000, all inclusive.

[6] The Kirkland Defendants note that courts typically look to the complexity and importance of the issues to the parties and the conduct of the litigation when considering a lump sum award of costs. While "amount involved" is not specifically referenced in Tariff C, nor as part of a lump sum formula, the Kirkland Defendants say it can be an indicator of both complexity and the importance of issues. The amount involved in this case is substantial with IRC claiming $350 million from the Defendants. The Kirkland Defendants say the amount alone signals the high stakes and importance of vigorously defending the claim. They say the claim was complex, involving sophisticated corporate parties (and their various related entities) in multiple jurisdictions, and a proposed "novel approach" to the oppression remedy. Senior counsel from multiple law firms were involved throughout for all parties and submissions took place over multiple days. The Kirkland Defendants say this shows that the stakes were high and the issues complex.

[7] In addition, the Kirkland Defendants submit that oppression claims add a reputational element to the financial threat. IRC alleged in the statement of claim that the Kirkland Defendants engaged in "unlawful conduct", "unlawful actions",

"worked in concert" with the Newmont Defendants to devise a "scheme", and "engaged in oppressive conduct". The Kirkland Defendants say these allegations cast the aspersion of bad faith conduct on them and that these reputational attacks invite costs consequences for the unsuccessful Plaintiff.

[8] In terms of the conduct of the litigation, the Kirkland Defendants say the key issue, whether IRC was a creditor of the Kirkland Defendants, had already been litigated and determined in Ontario in 2009. Moreover, the Kirkland Defendants note that the Royalty Agreement itself (attached as an exhibit to the affidavit of Peter McVey filed in support of the jurisdictional aspect of the motion) expressly states that there is no obligation on the part of any of the Defendants to carry on mining activity or otherwise operate the mine. The Kirkland Defendants say the current claim should never have been filed and, as such, an order for enhanced costs is appropriate.

[9] IRC's position is that each of the three Kirkland Defendants should recover $12,000 in costs and disbursements, for a total of $36,000. The $12,000 amount, which is based on Tariff C, is calculated as follows: (1) $3,000 (which is the basic costs amount for a 1.5 day motion); (2) multiplied by 4 (the maximum) because the matter was complex, IRC's claim was large and it was appropriate for the Kirkland

Defendants to take it seriously, and the summary judgment decision was dispositive of the claim.

[10] IRC says the tariffs are the norm in awarding party and party costs and there must be a reason to consider a lump sum (*Armoyan*, *supra* at para. 15). IRC notes that the Kirkland Defendants have requested a costs award of $115,000 without any authority to support recovery in that range after completion of only two steps in the action: (1) receipt and review of the notice of action and statement of claim (and the subsequently amended version of that pleading); and, (2) the Rule 13.03 motion on the pleadings. IRC submits that the Kirkland Defendants' costs position is based on the flawed premise that they were free to incur as much as they wished in legal expenses and IRC would be responsible for more than 50% of the total.

[11] IRC further submits that "reasonableness" is the starting point for any costs assessment based on the fees actually incurred. In IRC's submission, the court cannot assess reasonableness of the fees incurred without copies of counsel's accounts outlining the nature of the work performed (with privileged information redacted), the hours worked, and the hourly rates for each timekeeper. In this case, the Kirkland Defendants have only provided summary information through two legal assistants about the total legal accounts rendered by counsel in Halifax and Toronto.

IRC says that without more detailed evidence, the Kirkland Defendants' costs must be assessed using Tariff C.

[12] As to the argument that the oppression-based claims pleaded by IRC cast negative "aspersions" on the Kirkland Defendants, IRC says it is a clear attempt to equate IRC's claims with fraud claims because the latter attract solicitor and client costs. IRC submits that the argument is unsustainable for several reasons: First, it is not supported by any authority; Second, the nature and language of the oppression claim against the Kirkland Defendants are derived from the statute upon which the claim is based, and so cannot be impugned; Third, it is uncontested that the Kirkland Defendants are signatories to and/or beneficiaries of a contract with Newmont Canada FN Holdings ULC and so IRC cannot be faulted for alleging that the two sets of defendants worked together; Fourth, for IRC to use the word "unlawful" to describe the Kirkland Defendants' conduct is entirely appropriate as the adjective applies equally to both impugned civil and criminal activities and without unlawful conduct most claims cannot succeed. IRC says none of these aspects of its pleading is a basis for increased costs.

[13] IRC also submits that the quantum of costs claimed by the Kirkland Defendants reflects their "kitchen sink" approach to the motion, in which they advanced the arguments that the court did not have jurisdiction to hear IRC's claims

and that Nova Scotia was *forum non conveniens*. IRC says the court found that the determination of only one issue – whether IRC was a "complainant" for the purposes of s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 – was necessary to dispose of the motion. IRC says the Kirkland Defendants' arguments on jurisdiction and convenient forum were both unnecessary and doomed to fail given that only the Nova Scotia courts had jurisdiction to adjudicate all of IRC's claims. IRC says parties should not be rewarded with additional costs for overcomplicating their requests to the court.

[14] Finally, IRC points out that the $350 million amount it claimed was based on the Newmont Corporation's own estimate of its future liability under the Royalty Agreement which was included in its public financial statements. IRC says there is no evidence that the quantum of the claim generated extra work given the early stage of the proceeding and the fact that the Kirkland Defendants' motion was based on the pleadings only. Arguably, IRC says, the claim amount could have been $5 million or $1 billion and the work by the Kirkland Defendants' counsel would have been the same.

[15] In their reply, the Kirkland Defendants say there is no authority to support IRC's position that detailed accounts of legal fees, as opposed to totals of fees billed and paid, are mandatory in order to assess a lump sum award of costs. The Kirkland

Defendants say courts have frequently awarded lump sum costs in the absence of detailed accounts.

[16] The Kirkland Defendants point out that IRC does not suggest that the legal fees incurred are unreasonable. IRC merely submits that the court cannot assess the reasonableness. Moreover, IRC has not offered evidence of its own legal fees to show the unreasonableness of the Kirkland Defendants' fees by comparison.

[17] Finally, the Kirkland Defendants say there is no evidence that its alternative grounds for dismissal were doomed to fail. They submit that it was reasonable to bring the jurisdiction motion in circumstances where none of the facts underlying the case have any connection to Nova Scotia whatsoever and none of the Kirkland Defendants carry on business in Nova Scotia.

The evidence

[18] The Kirkland Defendants filed affidavits of Elizabeth Wilband, legal assistant at Cox & Palmer, and Maria Kalamaras, legal assistant at Cassels Brock & Blackwell LLP ("Cassels"). Neither affiant was cross-examined. The Kirkland Defendants also relied on the affidavit of Peter McVey filed in support of the jurisdictional aspect of the motion.

[19] Ms. Wilband stated in her affidavit that Cox & Palmer was retained as co-legal counsel for the Kirkland Defendants on August 4, 2021, and was asked to work together with counsel from Cassels in Toronto. Ms. Wilband stated that as of October 31, 2022, the Kirkland Defendants have incurred legal fees exclusive of tax in the amount of $95,135 for work done by Cox & Palmer; disbursements in the amount of $2,281.30 on account with Cox & Palmer; and $12,655.56 in taxes on legal fees and disbursements incurred on account with Cox & Palmer. As of October 31, 2022, then, the Kirkland Defendants have incurred a total amount of $110,071.86 in legal fees, disbursements and taxes to Cox & Palmer. Ms. Wilband attached "a detailed printout from our accounting records showing expenses billed and paid in relation to this matter" as an exhibit to her affidavit. Ms. Wilband also indicated that as of October 31, 2022, the Kirkland Defendants have paid a total amount of $104,480.91 to Cox & Palmer with the outstanding $5,590.95 expected to be paid in the near future.

[20] Ms. Kalamaras stated that Cassels was retained as legal counsel by the Kirkland Defendants and, on August 4, 2021, asked Cox & Palmer to work with Cassels as co-legal counsel. Cassels and Cox & Palmer each issued their own bills for legal services provided to the Kirkland Defendants. Like Ms. Wilband, Ms. Kalamaras attached a printout showing expenses billed and paid to Cassels in

relation to the matter. Ms. Kalamaras stated that up to April 30, 2022, the Kirkland Defendants have incurred legal fees exclusive of tax in the amount of $102,159.00 for work done by Cassels; disbursements in the amount of $6,140.30 on account with Cassels; and $14,071.63 in taxes on legal fees and disbursements on account with Cassels. As of April 30, 2022, then, the Kirkland Defendants have incurred a total amount of $122,370.93 in legal fees, disbursements and taxes on account with Cassels. Ms. Kalamaras also indicated that the Kirkland Defendants have paid the entirety of its account with Cassels.

[21] IRC filed no evidence with respect to costs.

The general principles of costs

[22] In *Royal Bank of Canada v. Colorcars Experience Automobiles Ltd.*, 2021 NSSC 6, which involved a motion for summary judgment on evidence, Bodurtha J. reviewed some of the Rules applicable to costs:

> [7] Civil Procedure Rule 77.02(1) reads:
>
> > 77.02(1) A presiding judge may, at any time, make any order about costs as the judge is satisfied will do justice between the parties.
>
> [8] Civil Procedure Rule 77.06(1) reads:
>
> > 77.06(1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.

[9] Civil Procedure Rule 77.07 provides factors which are relevant to increasing tariff costs:

> **Increasing or decreasing tariff amount**
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> > (a) the amount claimed in relation to the amount recovered;
> >
> > (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
> >
> > (c) an offer of contribution;
> >
> > (d) a payment into court;
> >
> > (e) conduct of a party affecting the speed or expense of the proceeding;
> >
> > (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
> >
> > (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
> >
> > (h) a failure to admit something that should have been admitted.
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.

[10] Civil Procedure Rule 77.08 provides a general discretion to award costs in a lump sum instead of tariff costs. Civil Procedure Rule 77.08 reads:

> 77.08 A judge may award lump sum costs instead of tariff costs.

[11] Civil Procedure Rule 77.10(1) reads:

> 77.10(1) An award of party and party costs includes necessary and reasonable disbursements pertaining to the subject of the award.

[23] In *Tri-Mac Holdings Inc. v. Ostrom*, 2019 NSSC 44, Smith J. summarized the principles applicable to determining costs:

[2] The general rule is that costs follow the event. That rule is not absolute. There are no reasons why that rule should not apply here. The real issue is the amount of those costs.

[3] The starting point in determining the quantum of costs is the Tariffs of Costs and Fees under Rule 77. Costs on a motion are governed by Tariff C, unless the judge orders otherwise: Rule 77.05(1). A judge has the discretion to add or subtract from the tariff amount: Rule 77.07. Furthermore, a judge "may award lump sum costs instead of tariff costs": Rule 77.08.

[4] The guiding principles in awarding costs were considered by the Nova Scotia Court of Appeal in *Armoyan v Armoyan*, 2013 NSCA 136. Hunt J. recently summarized the Court's comments from *Armoyan* in *Grue v McLellan*, 2018 NSSC 151, [2018] NSJ No 262:

> 6 In *Armoyan v. Armoyan*, 2013 NSCA 136, the Nova Scotia Court of Appeal provided direction with respect to the principles to be considered when determining costs. Specifically, Justice Fichaud stated:
>
> 1. The court's overall mandate is to do "justice between the parties": para. 10;
>
> 2. Unless otherwise ordered, costs are quantified according to the tariffs; however, the court has discretion to raise or lower the tariff costs applying factors such as those listed in Rule 77.07(2). These factors include an unaccepted written settlement offer, whether the offer was made formally under Rule 10, and the parties' conduct that affected the speed or expense of the proceeding: paras. 12 and 13.
>
> 3. The Rule permits the court to award lump sum costs and depart from tariff costs in specified circumstances. Tariffs are the norm and there must be a reason to consider a lump sum: paras. 14-15
>
> 4. The basic principle is that a costs award should afford a substantial contribution to, but not amount to a complete indemnity to the party's reasonable fees and expenses: para. 16
>
> 5. The tariffs deliver the benefit of predictability by limiting the use of subjective discretion: para. 17
>
> 6. Some cases bear no resemblance to the tariffs' assumptions. For example, a proceeding begun nominally as a chambers motion, signaling Tariff C, may assume trial functions; a case may have "no amount involved" with other important issues at stake, the case may assume a complexity with a corresponding work load, that is far disproportionate to the court time by which costs are assessed under the tariffs, etc.: paras. 17 and 18; and
>
> 7. When the subjectivity of applying the tariffs exceeds a critical level, the tariffs may be more distracting than useful. In such cases, it is more realistic to circumvent the tariffs, and channel that discretion directly to the

> principled calculation of a lump sum which should turn on the objective criteria that are accepted by the Rules or case law: para. 18.
>
> [5] These principles provide the broad background for costs awards generally.
>
> [6] Courts will depart from Tariff C amounts when the basic award of costs under the Tariff would not adequately serve the principle of substantial but not complete indemnity for legal fees of the successful party. …

[24] Tariff C, the "starting point" for determining costs on a motion, provides:

> **Tariff of Costs payable following an Application heard in Chambers by the Supreme Court of Nova Scotia**
>
> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.
>
> (2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>
> (a) the complexity of the matter,
>
> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.
>
> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)

Length of Hearing of Application	**Range of Costs**
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1,000 - $2,000
1 day or more	$2,000 per full day

[25] In *Homburg v. Stichting Autoriteit Financiele Markten*, 2017 NSSC 52, Wood J. (as he then was) emphasized that a party's actual legal account should not be considered until the end of the cost analysis after a decision to award lump sum costs is made:

> [9] **It is important to recognize that the substantial contribution principle underlies the tariffs but does not supersede them.** Most cost matters should be disposed of based upon an application of the tariffs with the built in discretion to adjust amounts for the factors identified in Rule 77. **The mere fact that the party's actual legal account is significantly more than the tariff does not automatically justify a departure. To suggest otherwise would turn the court into a taxing master whose function is to first assess the reasonable solicitor client account and then apply some percentage recovery between 50% and 100%.**
>
> [10] **The cost analysis should not start with an examination of the reasonableness of a party's account.** The court is not equipped on a cost motion to inquire into all of the reasons why the account was rendered in a particular amount. That will depend upon the terms of the fee agreement between solicitor and client, client instructions, efficiency of counsel, etc. **By application of the tariff similar hearings will result in costs being awarded in roughly equivalent amounts and the predictability of such a result is desirable. If the focus is on calculating a substantial contribution to actual legal expenses, the result will be different in every case. The variation in counsel fees could be dramatic, even though the actual hearings are comparable in terms of duration and complexity.**
>
> [11] In my view the proper approach is to start with the presumption that the tariffs should be applied. If the party who wishes to depart from those rules can establish circumstances which show a lump sum is appropriate in order to do justice between the parties, then the court should engage in a principled analysis to determine the amount. This would lead to an assessment of the party's reasonable expenses and identification of an amount that represents a substantial contribution to them.
>
> [12] The fact that **consideration of legal fees incurred comes at the end of the analysis, and after a decision to award lump sum costs is made**, is reflected in the following comments from the *Armoyan* decision:
>
>> [29] The propriety of a lump sum award may be tested by comparing the proposed tariff award to the actual legal fees and expenses. Mr. Armoyan's calculation under the tariffs is $117,714.64. Even after the adjustments that I will discuss later, Ms. Armoyan's legal fees and disbursements exceed

> $450,000 for the Nova Scotia forum conveniens proceeding and both appeals. A recovery of about 27% does not approach the "substantial contribution" that Justice Freeman contemplated in *Williamson*.
>
> [Emphasis added]

Analysis

[26] The basic principle in awarding costs is that the award should afford a substantial contribution to the party's reasonable fees and expenses. Where the tariffs will not adequately serve this principle, a lump sum may be appropriate. In this case, the Kirkland Defendants say that, given the size and nature of the claim, the maximum award under Tariff C – $36,000 – will not afford a substantial contribution to their actual legal fees and expenses and ask the court to exercise its discretion to award lump sum costs in the amount of $115,000, all inclusive.

[27] IRC says the court must apply the tariffs in this case because the Kirkland Defendants have provided only summary information about the total legal accounts rendered by Cox & Palmer and Cassels. I do not agree that the court's discretion over costs is constrained in this way. IRC has not provided any authority for the proposition that detailed accounts of legal fees, as opposed to totals of fees billed and paid, are required for the court to consider a lump sum costs award. Moreover, IRC's proposition is inconsistent with the direction in *Homburg*, *supra*, that a party's actual legal costs should be considered at the end of the analysis after a decision to award lump sum costs is made.

[28] In *Wadden v. BMO Nesbitt Burns*, 2014 NSSC 11, aff'd 2015 NSCA 48, Justice Warner noted that lump sum costs can be awarded without *any* evidence of a party's actual legal costs:

> [32] In a seminal 1992 costs decision – *Landymore v Hardy*, 1992 NSSC 70, Saunders J (as he then was), adopted the principle that when awarding costs to a successful party, **the award should reflect a substantial contribution towards, but not total indemnity of, that party's <u>objectively reasonable</u> litigation costs**.
>
> [33] The Nova Scotia Court of Appeal endorsed this principle in *Williamson v Williams*, [1998] NSJ No. 498. Freeman J.A. added that "substantial" meant more than fifty percent and less than one hundred percent of a lawyer's reasonable bill, and more specifically might have been between two-thirds and three-quarters. These decisions adopted lump sum awards to implement the principle of substantial indemnity. The courts sought to avoid "artificial" application (or manipulation) of the tariff for party and party costs as a means to implement the principle.
>
> [34] The principle enunciated in *Landymore* and defined in *Williamson*, has been repeatedly applied by our courts. See: *Bevis v CTV*, 2004 NSSC 209 (para 13); *Driscoll v Crombie Developments*, 2006 NSSC 262; *Morash v Burke*, 2007 NSSC 68 and, very recently, *Armoyan v Armoyan*, 2013 NSCA 136.
>
> [35] In *DRL Coachlines v GE Canada*, 2011 NSCA 23, at para 34, the Court of Appeal specifically rejected the necessity of tendering information as to the actual legal costs of the successful party to satisfy the principle that a costs award is to provide a substantial but not total indemnity for the legal fees incurred by the successful party. The Court's statement is consistent with the analysis in *Landymore* and *Williamson*. **The principle of substantial indemnity by lump sum award is not dependent on actual legal costs charged the party. It is related to an <u>objectively-determined assessment</u> of what constitutes reasonable legal fees.**
>
> [36] This point is relevant by reason of BMO's request for substantial but not total indemnity of its legal costs by means of a lump sum award. It is not necessary that BMO produce evidence of its actual legal costs.
>
> [Emphasis added]

[29] In *Sipekne'katik v. Nova Scotia (Environment)*, 2017 NSSC 254, cited by the Kirkland Defendants, Sipekne'katik requested lump sum costs in the amount of $75,000 following its successful appeal of a decision of the Minister of Environment

made pursuant to section 137 of the *Environment Act*. The appeal was heard over two days. Sipekne'katik filed an affidavit showing costs incurred of $172,904. The respondent Alton Gas argued that the actual costs incurred by Sipekne'katik should be reduced by ten percent because no details of the legal work were provided. Justice Hood disagreed, stating at para. 29:

> In *Trinity*, the court awarded lump sum costs without having affidavit evidence of actual invoices.
>
> In *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Company Ltd.*, 2011 NSSC 423, Duncan, J. concluded that, since there was no accounting for the work done, no guarantee that it related solely to the matter before him, and was for an amount which "seems extraordinary" when compared to the union's account (para. 60):
>
>> … it would be speculative of me to say that the amount billed was reasonable or necessary … (para.61)
>
> He said in para. 62 that he would not place much weight on that evidence.
>
> This case does not have the problems alluded to by Duncan, J. which caused him to give little weight to the amount of fees claimed. **In my view, that decision does not stand for the proposition that actual invoices must be submitted.**
>
> Furthermore, in the circumstances of this case and in light of the fact that the duty to consult issue may still be litigated, it would not be appropriate for actual invoices to be provided. Solicitor-client privilege needs to be protected.
>
> [Emphasis added]

[30] The Kirkland Defendants say lump sum costs are supported by the following factors:

- A substantial contribution to actual fees cannot be achieved via the Tariff;
- The amount involved of $350,000,000 and the reputational attacks warranted a vigorous defence;
- The complexity of the facts, multitude of parties and jurisdictions and a proposed "novel approach" to the oppression remedy, led to the degree of

> preparation, the presence of multiple counsel and multiple law firms for each party;
>
> - Final disposition of the matter in favour of the Kirkland Defendants was supported by the fact that the main issue had already been litigated and determined in Ontario in 2009; and
> - Although not considered on the pleadings portion of the Motion (as it is not contained in the pleadings), for the purposes of costs it is relevant that the Royalty Agreement (attached as Exhibit "A" to the Affidavit of Peter McVey), expressly states that there is no obligation to carry on mining activity, or otherwise operate the mine on the part of any of the defendants and thus, the Kirkland Defendants ought not to have been vexed with expensive litigation.
>
> [Kirkland Defendants brief (December 6, 2022), at page 3]

[31] It is true that $350 million is a sizable claim and the matter would be of considerable importance to the parties. That said, just as a substantial legal account does not automatically justify a departure from the tariff, neither does a large claim. The fact that IRC claimed $350 million in damages does not, on its own, mean the issues were complex and required an unusual or extraordinary degree of preparation by counsel. There must be other indicia that the case assumed "a complexity, with a corresponding workload, that is far disproportionate to the court time, by which costs are assessed under provisions of the Tariffs" (*Armoyan*, *supra*, at para. 18). In *Sipekne'katik*, *supra*, for example, the court concluded that the matter was sufficiently complex to justify departing from the tariffs for the following reasons:

> [16] In my view, this matter was complex. It is true that the issue of procedural fairness has been dealt with in a number of decisions; however, the position taken by the Minister on the issue of consultation made the matter more complex. **The Minister's argument was that there was no duty to consult, basing this upon an interpretation of a number of previous decisions.** Although the Minister

subsequently withdrew the claims made with respect to the duty to consult, this was not done until after the conclusion of the hearing. Accordingly Sipekne'katik incurred significant legal costs in responding to this issue. The positions which were withdrawn after the hearing are set out in summary in para. 35 of Sipekne'katik's submissions on costs. They include:

> Nova Scotia does not owe a duty to consult to Sipekne'katik;
>
> The constitutional duty to consult does not apply in Nova Scotia;
>
> The historical evidence demonstrates that there was a submission by the Mi'kmaq peoples, which negates a constitutional duty to consult;
>
> The Supreme Court of Canada *R. v. Marshall*, [1999] 3 SCR 456 was wrongly decided; and
>
> The law does not support a claim on Marshall treaty rights and title at Shubenacadie.

[17] Although ultimately these issues were not dealt with in my decision, Sipekne'katik had to respond to them.

[18] **In addition the issue was an important one for Sipekne'katik**. As Sipekne'katik said in para. 32 of its written submissions on costs:

> The appeal concerned a project located in the traditional territory of the Mi'kmaq, and Sipekne'katik is the closest community to the Alton Gas project. Furthermore … the positions that the Minister took in the appeal proceedings included a denial of established treaty and Aboriginal rights. The threat to established rights was of significant importance to Sipekne'katik.

[19] **In my view, the amount of effort involved in preparing for and conducting the application was extensive. The Minister filed a record which comprised ten volumes and a supplementary record together totalling thousands of pages. Substantial time was required to review the record. In addition, lengthy affidavits and extensive legal briefs were filed. Six affidavits were filed by Sipekne'katik with numerous exhibits which totaled 408 pages. The Minister filed one affidavit in response and two affidavits were filed by Alton totalling 691 pages. In addition, the briefs were extensive: 157 pages from Sipekne'katik, 77 pages from the Minister and 81 pages from Alton. Extensive books of authorities were filed. I agree with Sipekne'katik's submission at para. 7 of its brief that "The workload was far disproportionate to the Court time in this case."**

[Emphasis added]

[32] The court went on to award $75,000 in lump sum costs:

> [51] I conclude, based upon all the factors to which I have referred above, that Sipekne'katik's request for all inclusive lump sum costs in the amount of $75,000 is a just and appropriate award of costs which will do justice among the parties. It represents a substantial but not complete indemnity. The total costs claimed to have been incurred are $172,904. The lump sum award is approximately 43 percent of those total costs. Considering the "thrown away costs" as a factor, I am satisfied that is an appropriate costs award. I also note the costs award is inclusive of a relatively modest amount for disbursements.

[33] In contrast, in *Homburg*, *supra*, the court acknowledged that the matter was complex enough to apply a multiplier of four, but not so complex as to justify departing from the tariffs. The court stated:

> [13] **In this case the defendants' submission that a lump sum is appropriate was based primarily on the size of its solicitor client account and the relatively small contribution a tariff award would make towards that amount.** They also referred to the complexity of the matter and the significance of the issues to the defendants as part of the justification for a lump sum.
>
> [14] The hearing itself spanned three days and the last day concluded at noon. A day and a half was devoted to cross-examination of one of the defendants' deponents and *viva voce* testimony from a witness subpoenaed by the plaintiffs. Counsel submissions took approximately a half day for each party. I would assess the hearing as three full days for Tariff C purposes. Because of the finding on sovereign immunity the decision was determinative of the entire proceeding which would bring into play para. 4 of Tariff C which reads:
>
>> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:
>>
>>> (a) the complexity of the matter,
>>>
>>> (b) the importance of the matter to the parties,
>>>
>>> (c) the amount of effort involved in preparing for and conducting the application.
>>
>> (such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as certiorari or a permanent injunction.)
>>
>> Length of Hearing of Application Range of Costs

Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1000 - $2000
1 day or more	$2000 per full day

> [15] I have no difficulty concluding that the complexity of the matter, the importance to the parties and the effort involved in preparing for and conducting the application would justify increasing the tariff amount by four times. **There were extensive affidavits filed, including opinions with respect to Netherlands securities law, translation of documents and cross-examination using an interpreter. Using the maximum daily amount of $2,000 and the multiplier of four, the tariff amount I calculate is $24,000 plus disbursements.**
>
> [16] **Although the complexity of the matter was such that a multiplier of four was appropriate, I do not think it was sufficient to move outside of the tariff and consider awarding a lump sum. The legal issue of sovereign immunity is not common but that does not necessarily equate to increased complexity.** The analysis set out in my earlier decision indicates it is primarily a question of fact. In this case there was not much dispute about what was done by the Dutch regulators and most of the argument focused on its legal significance. **In many ways the hearing was no more complex than other matters dealt with by the court including summary judgment, judicial review and forum non-convenience. The amount of the defendants' legal expenses is not enough to convince me that the hearing bore no resemblance to the assumptions under which the tariffs were developed so as to justify departing from them.**
>
> [Emphasis added]

[34] The court in *Homburg*, *supra*, found that the international nature of the litigation did result in increased costs and increased the tariff amount by a factor of two thirds ($16,000) to account for this factor.

[35] In terms of complexity, the present case has little in common with the facts in *Sipekne'katik, supra*, or even those in *Homburg, supra*. The hearing of the Kirkland Defendants' motion took only 1.5 days and the materials filed were not extensive. No evidence is permitted on a motion for summary judgment on the pleadings. On

the issue of jurisdiction and *forum conveniens*, the Kirkland Defendants filed two two-page affidavits of Peter McVey, K.C., each attaching several exhibits; a two-page affidavit of Wendy Yu, Vice President, Legal for Kirkland Lake Gold Ltd., attaching a single exhibit; and a single-page affidavit of Jo-Ann Welton, a corporate services clerk at Cox & Palmer, attaching a list of names and addresses of the Directors and Officers of Newmont Canada Corporation. IRC filed a two-page affidavit of Michelle Awad, K.C., attaching several exhibits. None of the affiants were cross-examined. The parties' briefs were unremarkable in terms of length and content.

[36] The legal issues raised on the motion were not overly complex. The oppression remedy protects only those expectations derived from an individual's status as a security holder, creditor, director or officer of a corporation. IRC is not, and has never claimed to be, a shareholder, officer or director of any of the Kirkland Defendants. As a result, the survival of its claim turned on whether the pleadings could support a finding that IRC was an indirect creditor of the Kirkland Defendants. As I noted in my decision, however, the facts as pleaded by IRC – including the findings made in the 2009 decision of the Ontario Superior Court of Justice – were incompatible with the existence of a creditor-debtor relationship between IRC and

St. Andrew. The claim was clearly baseless which means it should not have been a difficult one for the Kirkland Defendants to defend.

[37] The jurisdictional issues involved in the Kirkland Defendants' alternative arguments were somewhat more complex but not to a considerable degree. Like the court in *Homburg*, *supra*, I do not think the issues were sufficiently complex to move outside of the tariff and consider awarding a lump sum. Complexity can be adequately addressed through the application of a multiplier, which IRC has conceded is appropriate in the circumstances. I would add that it was not unreasonable for the Kirkland Defendants, none of which are currently registered under the *Canada Business Corporations Act* or the *Companies Act*, R.S.N.S. 1989, c. 81, to have raised these issues in defence of IRC's claim. The court's determination that it was unnecessary to consider them once it concluded that IRC's claim should be dismissed does not mean the arguments were doomed to fail or should otherwise not have been advanced by the Kirkland Defendants.

[38] It goes without saying that the Kirkland Defendants were free to retain law firms in both Toronto and Halifax to represent them in defending IRC's claim. However, the notion that the complexity of the claim made it reasonable or necessary to involve two sets of counsel is not borne out by the record.

[39] I am likewise not convinced that a lump sum should be ordered due to the "reputational attacks" the Kirkland Defendants say were contained in IRC's pleadings. The allegations made by IRC were typical of a claim for an oppression remedy. If the Kirkland Defendants' argument was accepted, enhanced costs would be ordered every time an oppression claim was unsuccessful.

[40] That said, I find it appropriate to add an amount to the tariff costs because IRC should have recognized, based on the findings in the 2009 decision of the Ontario Superior Court of Justice, that IRC was not a creditor of any of the Kirkland Defendants and, as a result, that it could not succeed in an oppression claim against them. The Ontario decision made it abundantly clear that the Kirkland Defendants had no financial obligation to IRC under the Royalty Agreement. While I am not prepared to find that the claim was filed for purely "strategic" reasons, as the Kirkland Defendants assert, I am satisfied that it was, at least, an ill-considered decision that warrants increased costs. To account for this factor, I will add $10,000 to the tariff costs of $36,000 for a total award of $46,000. The Kirkland Defendants have filed no evidence to prove its individual disbursements. The court has made it clear on many occasions that disbursements must be proven if they are to be recovered (see, for example, the court's review of the law in *Matthews v. Ocean*

Nutrition Canada Limited, 2022 NSSC 118, at paras. 163-168). There will be no award for disbursements.

[41] While a costs award of $46,000 falls far short of the $115,000 requested by the Kirkland Defendants, I am satisfied that it will more than adequately serve the basic principle of costs. To put it plainly, the only extraordinary feature of the Kirkland Defendants' motion is the amount of legal fees they have incurred at such an early stage of the litigation. Evidence of a party's actual legal fees cannot be the starting point or the deciding factor when the court considers whether to award lump sum costs.

Conclusion

[42] I order that IRC shall pay $46,000 in costs to the Kirkland Defendants. There will be no award for disbursements. I ask counsel for the Kirkland Defendants to prepare the order.

McDougall, J.