IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON



***726982 NB Ltd. and Ryan Vibert v. Go Oil Canada Inc.***
***2025 NBKB 018*** ***MC/246/2023, MC/472/2024, MC/474/2024***

BETWEEN: **726982 NB LTD and RYAN VIBERT,**

– and –

**GO OIL CANADA INC.**

# DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Moncton, New Brunswick

DATE OF HEARING: January 20, 2025

DATE OF DECISION: January 24, 2025

APPEARANCES: Chris Pelkey, for the Plaintiffs

**DEWARE, C.J.**

## INTRODUCTION

[1] The Court granted the Plaintiffs' motion in this matter and ordered that service of the Plaintiffs' action be validated as of October 10th, 2024 pursuant to Rules 18.09(a) and 18.09(b) of the New Brunswick Rules of Court. The Court further granted the Plaintiffs' request for costs on a solicitor-client basis in the amount of $ 10,000.00. Given the unusual nature of an order for solicitor-client costs, the Court indicated in its oral decision that written reasons would be issued on the question of costs. These are those reasons.

## FACTS

[2] The Plaintiff, Ryan Vibert, entered into a franchise agreement with the Defendant in October 2021. The action filed by the Plaintiff relates to the recission of the Franchise Agreement. The facts as they relate to the issue of service of the action are succinctly set out by the Plaintiff in paragraphs 5 – 28 of their pre-hearing brief as follows:

> The First Claim and Service
>
> 5. Following the rescission of the Franchise Agreement by the Plaintiffs, the Defendant failed to provide the Plaintiffs with full reimbursement and compensation required by the Franchise Act.
>
> 6. On or about March 28, 2023, the Plaintiffs commenced an action against the Defendants by filing a Notice of Action with Statement of Claim Attached ("Claim #1").
>
> 7. On or about June 19, 2023, the Plaintiffs sent correspondence from their solicitor, Chris Pelkey of McInnes Cooper, along with Claim #1, an Acknowledgement of Receipt Card, and a self-addressed stamped

envelope via pre-paid registered mail to the Defendant, specifically addressed to John Sparrow, the Defendant's founder and chief executive officer, at 446 Brooklyn Street, Unit B, Winnipeg, Manitoba, the address provided by the Defendant in various franchise documentation.5 On or about July 17, 2023, the package was returned to the Plaintiffs by Canada Post as "unclaimed".

8. The Plaintiffs retained the services of a process server in Manitoba, being Kim Pemberton of Patrick Robson Bailiffs, in early July 2023 to serve Claim #1 on the Defendant.

9. On or about July 12, 2023, Ms. Pemberton, advised Mr. Pelkey via email correspondence that she had left a copy of Claim #1 with an individual named "Rose" at Unit 441-100 Innovation Drive, Winnipeg, Manitoba, an addressed determined by performing a corporate registry search.8 Mr. Pelkey advised Ms. Pemberton that Claim #1 should be served on Mr. Sparrow at 446 Brooklyn Street, Unit B, Winnipeg, Manitoba.9 On or about July 18, 2023, Ms. Pemberton advised Mr. Pelkey that Unit B at 446 Brooklyn Street was vacant.

10. The Plaintiffs then attempted to serve Mr. Sparrow at his home address which was determined via online property search to be 807 Kanata Street, Winnipeg, Manitoba.

11. On or about September 11, 2023, Ms. Pemberton informed Mr. Pelkey that she had attended to 807 Kanata Street and was advised that Mr. Sparrow was not a resident of that address.

12. On or about September 19, 2023, Mr. Pelkey received a telephone call from Mr. Sparrow where Mr. Sparrow indicated that he would put Mr. Pelkey in touch with the Defendant's counsel and provide him with an address for service.

13. On or about September 20, 2023, Mr. Pelkey contacted Mr. Sparrow via email correspondence, following up on the above noted telephone conversation and requesting an updated address for service. Mr. Pelkey also attached a PDF copy of the Plaintiffs' Notice of Action with Statement of Claim to his email to Mr. Sparrow.

14. On or about September 29, 2023, Mr. Sparrow replied to Mr. Pelkey and advised that his address for service was 167 Lombard Avenue, Suite 500, Winnipeg, Manitoba.

15. On or about November 20, 2023, Ms. Pemberton attended to Suite 500 of 167 Lombard Avenue to serve Claim #1 on Mr. Sparrow. Ms. Pemberton advised Mr. Pelkey that Suite 500 was an office rented out by many different companies and no individual present knew of Mr. Sparrow or Go Oil.16 Ms. Pemberton was unable to serve the Defendant at the 167 Lombard Avenue address.

16. On or about December 1, 2023, Mr. Pelkey received an email from Adrienne Boudreau, of Sotos LLP, advising that they had been retained by the Defendant in relation to Claim #1.

17. Mr. Pelkey wrote to Ms. Boudreau on two occasions following her December 1, 2023, email correspondence enclosing a copy of Claim #1 and requesting that the Defendant file their statement of defence.

18. On or about December 18, 2023, Ms. Boudreau responded to Mr. Pelkey, stating that she had recommended that the Defendant accept service, but had not yet received instructions from the Defendant.

19. On or about January 24, 2024, Mr. Pelkey followed up with Ms. Boudreau, requesting an update from Ms. Boudreau's correspondence of December 18, 2023, but he did not receive a reply.

The Second Claim and Service

20. On or about June 21, 2024, the Plaintiffs filed a second, identical Notice of Action with Statement of Claim Attached ("Claim #2") to preserve the Plaintiffs' legal rights given the difficulties in serving Claim #1 on the Defendant.

21. On or about June 27, 2024, Mr. Pelkey emailed Ms. Boudreau a copy of Claim #2 and requested that she accept service for the Defendant. Ms. Boudreau responded to Mr. Pelkey advising that Sotos LLP no longer represented the Defendant.

22. On or about July 19, 2024, Mr. Pelkey received a telephone call from Colin Pendrith of Cassels Brock & Blackwell LLP, advising that Cassels had been retained by the Defendant in relation to claim of the Plaintiffs.

23. On or about October 10, 2024, Mr. Pelkey sent email correspondence to Jaime Arabi of Cassels, enclosing a copy of Claim #2 and requesting that Mr. Arabi acknowledge receipt and authorize service. Mr. Arabi advised Mr. Pelkey that he would seek instructions from the Defendant regarding accepting service.

24. Mr. Pelkey followed up with Mr. Arabi on or about October 30, 2024, requesting that Mr. Arabi confirm if he had received instructions to accept service of Claim #2 or alternatively to provide the Plaintiffs with an address for Mr. Sparrow so that the Plaintiffs could serve the Defendant.

25. On or about November 20, 2024, Mr. Pelkey followed up on his email correspondence of October 30, 2024, but did not receive a response from Mr. Arabi.

26. On or about November 20, 2024, Mr Arabi called Mr. Pelkey via telephone and advised Mr. Pelkey that he had been instructed by Mr. Sparrow to not accept service on behalf the Defendant and refused to provide a further address for service.

27. The Defendant has not been served with either Claim #1 or Claim #2.

28. The Plaintiffs' filed the within motion to validate service on December 10, 2024.

[3] The Defendant was aware of the hearing of the motion to validate service on January 20th, 2025, as Mr. Pelkey provided a copy of the Notice of Motion to Mr. Sparrow via email. Mr. Sparrow responded to Mr. Pelkey's email. No one appeared on behalf of the Defendant at the hearing of the motion and nothing was received by the Defendant regarding the motion.

[4] The Court had no difficulty determining it was appropriate to grant the relief sought by the Plaintiff pursuant to Rule 18.09 which states as follows:

> 18.09 Validating Service Where a document has been served by some method not authorized by an Act, these rules or an order of the court, or where there has been some irregularity in serv- ice, **the court may order that the service be validated on such terms as may be just, if the court is satisfied that**
>
> (a) **the document came to the notice of the person sought to be served,** or
>
> (b) the document was left so that it would have come to the notice of the person sought to be served, except for his own attempts to evade service.
>
> [Emphasis mine]

[5] In ***K.H. v. Minister of Social Development***, 2024 NBCA 56, the Court of Appeal commented at paragraph 10 as follows regarding the Court's considerations when reviewing a motion to validate service:

> [10] In ***A.M. v. M.C.***, 2022 NBQB 36, [2022] N.B.J. No. 28 (QL), the Court wrote:
>
> > In other words, if a document has been served in a manner not authorized by the Rules of Court, or there has been some irregularity in service, the Court may order that the service be validated, **if the Court is satisfied that the document came to the notice of the person sought to be served**, or the document was left so that it would have come to the attention of the person to be served, except that this person evaded service. [Emphasis added; para. 29]
>
> [Emphasis mine]

[6] There is no question in the current matter the Defendant, through its principal, Mr. Sparrow, was aware of the Plaintiff's claim. Mr. Sparrow had consulted two different lawyers in regards to the action, suggested the individual first served with the action wasn't an appropriate option and provided addresses, albeit erroneous, to the Plaintiff for service. The Plaintiff's entitlement to relief pursuant to Rule 18.09(a) was clear in these circumstances. The issue of greater concern to the Court was the amount of costs to be awarded to the Plaintiff given the conduct of Mr. Sparrow.

[7] Costs are a discretionary remedy available to the Court as set out in Rules 59.01 and 59.02 of the New Brunswick ***Rules of Court*** as follows:

> 59.01 Authority of the Court
>
> (1) Subject to any Act and these rules, **the costs of a proceeding or a step in a proceeding are in the discretion of the court** and the court may determine by whom and to what extent costs shall be paid.
>
> (2) Nothing in this rule shall be construed so as to interfere with the authority of the court
>
> (a) to fix the costs of a proceeding, or a step in a proceeding, with or without reference to a tariff, in- stead of requiring assessment of the costs,
>
> (b) to allow or refuse costs in respect of a particular issue or part of a proceeding,
>
> (c) **to order costs to be assessed on a solicitor and client basis**, or
>
> (d) where parties are entitled to costs from each other, to order set-off of the costs.
>
> 59.02 Costs of a Proceeding In fixing costs, the court may consider
>
> (a) the amount claimed and the amount recovered,
>
> (b) the apportionment of liability, (c) the complexity of the proceeding, (d) the importance of the issues, (e) **the conduct of any party which tended**

> **to shorten or unnecessarily lengthen the duration of the proceed- ing**,
>
> (f) **the manner in which the proceeding was con- ducted**,
>
> (g) **any step in the proceeding which was improper, vexatious, prolix or unnecessary**,
>
> (h) any step in the proceeding which was taken through over-caution, negligence or mistake,
>
> (i) **the neglect or refusal of any party to make an ad- mission which should have been made**,
>
> (j) whether or not two or more defendants or re- spondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence,
>
> (k) whether two or more plaintiffs, represented by the same solicitor, initiate separate actions unnecessa- rily, and
>
> (l) any other matter relevant to the question of costs.
>
> [Emphasis mine]

[8] In ***Olasz Scanning v. J & S Mechanical***, 2024 ONSC 6506, 2024 CarswellOnt 18365, Associate Judge Rappos of the Ontario Superior Court of Justice discussed the issue of validation of service and costs at paragraphs 20, 21 and 27 as follows:

> [20] I believe Justice Myers' comments in Strathmillan Financial Limited v. Teti regarding default proceedings are equally applicable to matters relating to service. Service issues should not be used by lawyers for tactical purposes. **Using the service rules for tactical advantage just sets the parties down the path of unnecessary motions**.
>
> [21] Where a lawyer has been retained by a defendant to represent him in an action, such counsel should consent to accept service of the statement of claim as a matter of professional courtesy. It is not in the interests of justice, or in the interests of any stakeholders accessing the judicial system, to require plaintiffs to bring motions to validate service and effectively compel counsel to accept service of the claim.
>
> […]
>
> [27] In my view, a costs award on a substantial indemnity basis is warranted in these circumstances. **The conduct of Mr. Ahmad in refusing to have his lawyer accept service unnecessarily lengthened**

> **this proceeding and was completely unnecessary. This motion was wholly unnecessary, and the conduct warrants costs on a substantial indemnity basis**.
>
> [Emphasis mine]

[9] In the circumstances of this case, the corporate defendant, through its principal, used every ploy including deception to evade service. Mr. Sparrow retained lawyers and then would not instruct them to accept service. Mr. Sparrow's conduct is egregious and rendered the Plaintiff's motion necessary, occasioning further costs and delay. This is, in my view, one of the rare cases where solicitor-client costs are warranted and necessary.

[10] In ***Doucet v. Spielo Manufacturing Inc.***, 2011 NBCA 44, the Court of Appeal discussed the issue of solicitor-client costs at paragraph 117 as follows:

> [117] It is hornbook law that, absent special circumstances, the purpose of a costs award in a "loser pay" system is to provide the successful party with partial indemnification with respect to the lawyer's fees incurred in either pursuing or defending an action or proceeding. What continues to baffle most is the level of indemnification that can balance two competing principles. A costs award should properly compensate the successful party and awards of costs should not deter plaintiffs from pursuing meritorious claims. When it comes to an award of party-and-party costs, the jurisprudence speaks generally of partial and substantial indemnification. **The notion of full indemnification persists, but usually in the context of an award for solicitor-client costs which is based on reprehensible, scandalous or outrageous conduct on the part of one of the parties**: Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112 (QL). Aside from the purpose of providing the successful party with indemnification, awards of costs have been used as a tool to influence the way in which the parties conduct themselves and to prevent abuse of the court's process. Hence, for example, in Ontario, three other recognized purposes of awards of costs are to encourage settlement, to deter frivolous actions and defences, **and to discourage unnecessary steps that unduly prolong the litigation**: 1465778 Ontario Inc. v. 1122077 Ontario Ltd., 2006 CanLII 35819 (ON CA), [2006] O.J. No. 4248 (C.A.) (QL), at para. 26. More recently, the Ontario Court of Appeal has sought fit to hold that the overriding principle governing awards of costs is "reasonableness", otherwise the result could be contrary to the

> fundamental objective of ensuring “access to justice”: Davies v. Clarington (Municipality), 2009 ONCA 722, [2009] O.J. No. 4236 (QL). This approach should be compared to that in Catalyst Paper Corp. v. Companhia de Navegaçao Norsul, 2009 BCCA 16, [2009] B.C.J. No. 52 (QL), where the British Columbia Court of Appeal summarized the recent trend in that jurisdiction to utilize the cost rules as a means of achieving a “winnowing” effect on the litigation process. See generally Mark M. Orkin, The Law of Costs, 2nd ed., Vol. 1, looseleaf (Toronto: Canada Law Book Inc., 2010) at pp. 2-1 et seq.
>
> [Emphasis mine]

[11] In ***Sirois v. Centennial Pontiac Buick GMC Ltd.***, 1988 Carswell New Brunswick 328, Justice Ryan, as he then was, of the New Brunswick Court of Appeal discussed orders for solicitor-client costs at paragraphs 11-13 as follows:

> 11 **Solicitor and client costs are awarded in rare and exceptional cases where the actions of one of the parties are onerous as against another party**. Orkin, The Law of Costs, 2nd ed. 1987 at pages 2-61 and 2-62 sets out the author's opinion along with a number of illustrations:
>
> > Such orders are not to be made by way of damages, or on the view that the award of damages should reach the plaintiff intact, and are inappropriate where there has been no wrongdoing.
> >
> > **An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation**. Orders of this kind have been made where a litigant's conduct has been particularly blameworthy, for example, where there were allegations of fraud or impropriety either unproven or abandoned at trial; or wanton and scandalous charges; or allegations of perjury; or collusion; or where the responsible party perpetrated a fraud on the court, e.g., by preparing and presenting forged documents; or by filing a deliberately deceptive affidavit in support of an order without notice; or by concealing a document until trial and then relying on it; **or prolonged the trial by engaging in obstructionist tactics**; or brought motions without merit to exhaust an opponent's resources; or intentionally misled the court by giving false evidence as to material facts; or in contempt proceedings. Solicitor-and-client costs have been awarded to the successful party where an action was without any foundation in law, or where an appeal was considered to be without merit; and in a libel action where fault was admitted, only the amount of damages being

> contested; or where a carrier failed to admit liability for the contamination of food until shortly before trial, although it had been aware of the facts much earlier; or where defendant in a wrongful dismissal action pleaded just cause without basis for the plea; or in an action for indemnification by an insured against his insurer where the insurer, in refusing to settle a personal injury claim had not used reasonable care for the protection of its insured, acted in bad faith and the plaintiff ought not to have had to bring the action.
>
> [Emphasis mine]



[12] In this case, Mr. Sparrow's actions in providing false addresses for service, consulting law firms but refusing to allow counsel to accept service, and then in failing to retain counsel he identified as acting for him prolonged the service of this action. The Plaintiff was put to multiple additional steps including the necessity of filing the present motion. The corporate defendant, through the action of its principal Mr. Sparrow, obviously evaded service and failed to acknowledge receipt of the action despite having full knowledge of the action, and consulting lawyers in relation to the action. The Plaintiff was put to the unnecessary expense of filing the present motion, as well as filing a second action. In my view, this is one of those rare and exceptional cases where the conduct of one of the parties warrants an order for solicitor-client costs.

[13] The Plaintiff is awarded costs on the motion on a solicitor-client basis in the amount of $ 10,000.00.

**DATED** at Moncton, New Brunswick this 24th day of January, 2025.

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Tracey K. DeWare,
Chief Justice of the Court of King's Bench
of New Brunswick