Court of King’s Bench of Alberta

Citation: Great North Equipment Inc v Penney, 2025 ABKB 42

Date: 20250124
Docket: 2301 08144
Registry: Calgary

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Between:

Great North Equipment Inc. and 1185641 BC Ltd.

Plaintiffs/Applicants

- and -

Bradley Penney, Neil MacDonald, Dustin Monilaws, Paloma Pressure Control LLC, Paloma PC Holdings LLC, Indeed Oilfield Supply LLC and Indeed Alberta Corp.

Defendants

- and –

Bradley Penney, Neil MacDonald, Dustin Monilaws, Paloma Pressure Control LLC, Paloma PC Holdings LLC and Poloma Pressure Control Canada LLC

Respondents

Costs Endorsement
of the
Honourable Justice Michael J. Lema

I. Introduction

[1] What scale of costs applies and what costs are payable where the respondents successfully resisted the extension and expansion of a commercial injunction barring solicitation, competition, and disclosure of confidential information?

[2] The backdrop is ***Great North Equipment Inc v Penney***, 2024 ABKB 533, where I declined to extend or expand the injunction.

[3] Most of the respondents seek 70 per cent of their legal fees, plus disbursements and other costs. One respondent and certain "Rule 6.8 witnesses" seek 100 per cent of their legal fees, plus disbursements and other costs.

[4] Per the first group, the 70 per cent figure is $498,769.13. Per the second group, the 100 per cent figure is $94,764.75. Meaning total fees sought of $593,533.88.

[5] Alternatively, they collectively seek Schedule C costs (using Column 5) of $97,325.00 and a 5x multiplier, for a total of $486,625.00.

[6] Per the applicants ("Great North"), no full- or partial-indemnity costs are warranted here. And Schedule C costs of only $54,675 are payable to the respondents collectively, increased at most by a multiplier of 1.5 i.e. a total of $82,012.50.

[7] For the reasons below, I accept Great North's arguments and, after allowing offsets for the costs of applications in which Great North was successful and its success in this costs determination, find that net costs of $65,000 are payable by it, plus disbursements to be agreed on or decided by an assessment officer.

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II. Respondents' rationales for "enhanced" costs

[8] The respondents advanced the following main rationales. My comments and findings are outlined beneath each one.

A. "Success in defeating the injunction application"

[9] This is correct. The injunction was not extended or expanded to include more parties.

B. "Complex issues in a specialized industry"

[10] The issues were not inherently complex. The core findings were:

- two of the individual defendants were not bound by covenants in a shareholder agreement they had not signed, seen, or been told out (with details of the covenants);
- the fiduciary-duties period (if any) did not extend beyond 14 months on the facts here; and
- a confidential-information claim was undercut by earlier disclosure (court filing) of that information.

C. "Having to coordinate multiple parties and counsel"

[11] The respondents said they often had to do this "on an expedited basis due to the lack of sufficient notice from Great North."

[12] However, they did not point to case law anchoring enhanced costs on the need for such coordination. In any case, I do not see such need as justifying such costs.

[13] As for insufficient notice, the complaints go both ways here (see the short-notice assertions and other complaints in para 7 of Great North's costs brief).

[14] While it is not perfectly clear on the available evidence, these complaints seem to balance out, undercutting the force of the respondents' emphasis on late-notice steps.

D. “Serious unfounded allegations of wrongdoing”

[15] Here are the details, per the respondents:

> … despite demonstrably lacking supporting evidence, Great North advanced its injunction application on the basis of serious allegation[s] of impropriety, including **allegations of breaches of a court order and alleged fiduciary duties**. It is quite clear that such allegations against a business entering a new market, and related individuals in a specialized industry, would be exceptionally harmful.
>
> Great North also sought relief for **serious allegations directly attacking the integrity and reputation** of the Respondents, including **known misuse of confidential information and conspiracy**. Indeed, Great North’s claim asserted that the Respondents knowingly conspired and took active steps to misuse Great North’s confidential information, work product and customer lists, and intercepting or misdirecting corporate opportunities. Justice Lema found at paragraph 125 [of the judgment] that those claims are without merit and found that “[…] the evidence does not support either allegation, especially in light of the insulating measures taken by Paloma as described in paras 120-121.”

[16] The respondents said these allegations “would/could cause significant reputational and economic harm to [us].”

[17] They cited ***Hill v Hill***, 2013 ABCA 313 on the impact of unfounded allegations:

> [Another] factor which the appellant calls irrelevant was **accusing the respondents of serious impropriety, with little or no evidence to support those accusations**. The appellant’s pleadings and arguments at every step were studded with examples of that. One could cite a dozen modern Alberta cases (some in the Court of Appeal) increasing costs for that reason. See also the ***Caterpillar*** case, *supra*, at para 12 [“ … The amounts were enormous, the charges were grave, and the business implications considerable. …”] Recent high authority is ***Hamilton v Open Window Bakery***, 2004 SCC 9, [2004] 1 SCR 303, 316 NR 265 (para 26). We are aware of no Canadian authority questioning the relevance of that factor. Indeed it is mandated by R 10.33(2)(a), (d), (e). …
>
> we have [also] noted above the undoubted incessant misconduct by the appellant plaintiff: a **host of grave but unfounded allegations of misconduct**. Similarly that got no weight at all during the second part of the trial when the defendants defended themselves against those allegations. That is baffling. [paras 19 and 52] [emphasis added]

[18] Here is the cited paragraph from the Supreme Court of Canada’s decision in ***Hamilton v Open Window Bakery***, which limits the circumstances where heightened costs are appropriate on the basis of litigation conduct:

> In *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that **solicitor-and-client costs “are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties”. An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since**

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> **not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct".** However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219. [para 26]

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[19] The decision denying extended or expanded life to the injunction largely did not turn on assessments that Great North had provided no or insufficient evidence of the asserted wrongdoing. On the noncompete front, the focus was whether certain noncompete covenants bound two of the individual defendants (answer: no). On the fiduciary-duty front, the focus was not so much on whether fiduciary duties had been breached but whether the individual defendants had fiduciary responsibility, if at all, extending beyond fourteen months (answer: no). On the confidentiality front, the focus was on whether the information in question, assumed confidential at one point, continued as such after disclosure via court filings i.e. with no assessment of the respondents' individual or collective use of the information (if any) or, if any whether any or all of them understood the information to be, or to have been, confidential.

[20] On the "knowing assistance" and conspiracy fronts, where Great North aimed to tie in the Paloma entities, it is accurate that I found no evidence of "knowing assistance" or "any agreement or an intent to harm [Great North]" (respondents' application brief, paras 118 and 123, adopted by me (among other paragraphs) in para 124 of the main judgment).

[21] Great North offered evidence of the individual respondents and the Paloma entities working together. Great North's theory was that, in those collective efforts, the individual defendants were breaching various noncompete and fiduciary obligations and misusing confidential information. From that, Great North effectively asked me to infer Paloma-entity awareness of those breaches and, by extension, assistance in them, all adding up to conspiracy.

[22] As explained, I found against Great North on the asserted wrongdoing-by-individuals, effectively undercutting their theory against Paloma.

[23] But that does not mean its inference-based allegations against Paloma (i.e. those initially focusing on the individual defendants) were groundless or that they were made in bad faith.

[24] In any case, the Paloma entities did not provide evidence that they were materially prejudiced by the conspiracy allegations. Or even that the allegations came to be known by "the industry" or anyone beyond the participants in this litigation.

[25] As well, the conspiracy aspect was a very minor theme of the application, drawing limited attention in the main judgment:

> On ["knowing assistance" and conspiracy], I accept the respondents' counter-arguments (paras 117-124 of their brief).
>
> In short, the evidence does not support either allegation, especially in light of the insulating measures taken by Paloma as described in paras 120-121. [paras 124 and 125, main judgment]

[26] The cited paragraphs from the respondents' brief outlined their no-evidence position (as discussed in para 20 above) and the Paloma entities' efforts to distance themselves from any Great North information and customers.

[27] To sum up here: I do not see any of Great North's allegations, on their own or collectively, as "reprehensible, scandalous, or outrageous conduct" within the meaning of ***Young v Young***.

[28] Also relevant here is that the respondents consented to the initial ten-month injunction. Against that backdrop, I see Great North's efforts to expand or at least to extend the injunction as even more distant from such conduct.

E. "Minimal evidence supporting an extended or expanded injunction"

[29] Per the respondents, "... the information [Great North] sought to protect was not confidential, its equipment was fully deployed [i.e. no business was lost], and [it was] referring customers to [one of the respondents] during the consent injunction period."

[30] As explained above, the application largely turned in the respondents' favour on the noted (no-contractual-covenants, no-further-fiduciary-duties-if-any, and information-no-longer-confidential) findings i.e. not on assessments of the strength or weakness of Great North's evidence of alleged misconduct by the respondents.

[31] This case is not akin to those collected by Wakeling JA in ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 where litigants "maintain positions or bring applications that are patently indefensible – the likelihood they will succeed is very low" (paras 124(g) and 126) or raise no "serious issue of fact or law" or "[know their] position [is] untenable" or "hopeless ... from the outset", or "patently hopeless" (from the associated footnote 135).

F. "Injunction baseless from the start"

[32] Per the respondents:

> Great North's application was entirely unnecessary. It is evident that the Consent Order granted by Justice Yamauchi on August 1, 2023 was sufficient to protect Great North's interests. **Justice Lema's findings confirm that the Individual Respondents were caught up in a baseless injunction since June 20, 2023**. The Individual Respondents cooperated with Great North by entering into the Consent Order over a year ago and have been subjected to incessant and unnecessary litigation ever since. As a result, the Respondents have incurred significant legal costs to defend an **application that was not properly particularized in respect of the Respondents**.

[33] I did not make any findings about overall state of the evidence or affairs generally when the injunction was sought or initially consented to. I did not explore whether the individual defendants had or may have had fiduciary responsibilities up to and at that time, whether any evidence showed breaches of any such responsibilities up to that point, or (if so) whether they might have supported an injunction, all aside from other circumstances that might have.

[34] Accordingly, even if the no-contractual-covenant and information-no-longer-confidential findings can be seen as reflecting the state of affairs at that earlier stage, it is inaccurate to say the main judgment here translates to "injunction baseless from the start."

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[35] In any case, as noted, the respondents (or a subset of them) consented to the injunction, even if the initial application "was not properly particularized in respect of [them]" or some of them.

[36] And both Mah J. and Sidnell J. found it appropriate to extend the injunction (for short periods) before the application I heard.

G. "Failure to accept compelling settlement offer"

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[37] Here's the respondent's account:

> On July 12, 2024, the Respondents served a **Calderbank offer** to discontinue the application on a **without-costs basis in the case of Mr. Penney** [one of the individual defendants] and **single Schedule C, Column 1 basis of the *Rules* on behalf of the three Paloma Respondents.** Great North rejected this offer. Calderbank offers give the Court discretion to award the offering party double costs for steps taken after delivery of the offer, which discretion should be exercised where: the **offer was reasonable** and involved **genuine compromise**, it gave a **cost advantage** if accepted, **adequate time** for consideration was provided, the offer was **unreasonably rejected**, and the party making the offer **fared better** than if the offer was accepted [citing *EAD Property Holdings (103) Corp v Greyhound Canada Transportation ULC*, 2015 ABQB 425 at paras 35-41]. It was a reasonable, genuine offer that gave a costs advantage, and the Calderbank offer was reasonably open for three days. The Respondents fared far better than if the offer were accepted. [emphasis added]

[38] Great North says:

> ... the Calderbank offers ... should not factor in favour of increased costs (R. 10.33(2)(h)). The offers ... on July 12, 2024 were **not open for a reasonable period of time** [citing *Kent v MacDonald*, 2020 ABQB 29 at para 20 (an offer ... open for one week a year prior to trial and ... again for 4 days on the eve of trial; this was found not to be a reasonable period)]. Offers to waive costs are also not always genuine offers [citing *Union Square Apartments Ltd v Academy Contractors Inc* ..., 2017 ABQB 151 at paras 18 and 19 (nominal offers to waive costs that are made early in the litigation will **not be considered to be "genuine" if they do not adequately reflect the relative strength of the parties' positions at the material time**)]. An offer of settlement that does not realistically reflect the relative merit of the parties' positions at the time it is made is not a genuine offer; it is one made without any reasonable expectation that it will be accepted and for the sole purpose of invoking the double-costs sanction [citing *Allen (Next Friend of) v Mueller*, 2006 ABCA 101 at para 16]. Such an offer is merely a no-risk litigation strategy or tactic [citing *Allen*]. Further, the Paloma Respondents' **offer was ambiguous**. The individual Respondents' offer was sent at 1.30 pm on July 12, 2024 and left open for acceptance until July 15, 2024. The Paloma Respondents' offer was sent at 3.48 pm and left open for acceptance until 4 pm on July 15, 2024. It was served around the same time as the service of the Respondents' 4 affidavits and a brief. In addition, the **offer was ambiguous [also]** as to whether the Paloma Respondents were reserving the right to continue to participate in the Injunction Application if it proceeded against the other

> Respondents, or whether they wished to accrue a right to challenge and set aside the then-existing consent injunction or any future injunction against the other Respondents. [emphasis added]

[39] I find that the offers were not open for a reasonable period, relying Loparco J.'s analysis in ***Kent v MacDonald*** (cited above) at para 20, the absence of evidence about the then-prevailing circumstances and why, in those circumstances, allowing only three days for a response was reasonable (in contrast to ***EAD Property Holdings*** (cited above), where Topolniski J. pointed to the then-prevailing "compressed timetable" as justifying a two-day turnaround), and the respondents not pointing to other cases finding or suggesting that a three-day turnaround can be adequate.

[40] As well, if I understand correctly from the respondents' description of the settlement offers, no offer was made by either Messrs. MacDonald or Monilaws. With no global settlement(s) offered, it was not unreasonable for Great North to reject the offers – at minimum, that of Mr. Penney – i.e. if it was continuing to face the same or similar issues with the continuing defendants.

[41] Finally, I accept Great North's position on ambiguity in the Paloma-front offer.

H. Conclusion – no bases for enhanced costs

[42] On balance, the respondents did not make out a case for enhanced costs on any of the claimed bases, individually or collectively.

[43] Even if they had, as explained below the respondents did not make out a case for enhanced costs at the claimed 70 per cent of legal fees paid or 100 per cent for the noted subset of respondents.

III. Solicitor-client-based costs not warranted here

[44] The respondents particularized their enhanced-costs claim as 70 per cent of legal fees paid.

[45] They calculated their 70 per cent figure at $498,769.13, meaning their overall legal fees paid must have been $699,670.19.

[46] However, they did not provide detailed bills of costs, statements of accounts, time records or other back-up information from which the reasonableness of the claimed amount could be gauged.

[47] Great North observed:

> Notably, the Respondents have **tendered no evidence, whether supported by affidavits, legal accounts or time records**, to support the allegations that the amount of $489,769.13 would compensate the Respondents for 70% of their costs or that the balance of $94,764.75 represents 100% of [Mr.] Monilaws and the Rule 6.8 Witnesses' costs (which Witnesses' costs should not be granted at all). The **mere assertion** that such amounts represent expended costs or portions thereof does not provide a sufficient basis to determine whether **"reasonable costs have been reasonably incurred"** [citing *Lynx Integrated Solutions Corp v*

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> *2031783 Alberta Ltd*, 2023 ABKB 271 at para 8[,] citing *McAllister v Calgary (City)*, 2021 ABCA 25 at para 46]. ... [emphasis added]

[48] The respondents countered in their supplementary costs submission (October 18, 2024 letter):

> ... [Great North] appear[s] to question whether the Respondents actually expended the costs claimed .... Respectfully, **casting aspersions on counsel-prepared costs submissions and related quantum as *mere assertions* is uncalled for**. As officers of the Court, Respondents' counsel reviewed legal accounts / time records in preparing the quantum of costs on behalf of the Respondents. Should the Court deem necessary, the Respondents are prepared to provide additional supporting documentation/records in support of their quantum of costs. [emphasis added]

[49] I find for Great North here. Pointing out the absence of supporting evidence is not "casting aspersions"; it is noting the absence of necessary evidence, per ***McAllister*** (paras 46-48); ***Barkwell v McDonald***, 2023 ABCA 87 (paras 59-61); ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 (paras 57 and 58); ***Petropoulos v Petropoulos***, 2023 ABCA 193 (para 18); ***Sutherland v Sutherland***, 2023 ABCA 185 (para 4); ***Klassen v Canadian National Railway Company***, 2023 ABCA 233 (para 8); and ***Kantor v Kantor***, 2023 ABCA 329 (paras 12-14).

[50] Plus, the supporting information should be put forward with the party's or parties' costs submissions: see ***Ho v Lau***, 2023 ABKB 15 at paras 39-51. As was directed in the main judgment:

> If the parties are unable to agree on the scale (indemnity, partial indemnity, enhanced, Schedule C multiplier, Schedule C base, other) or quantum of costs by September 13, 2024, the respondents' costs submissions (letter form – maximum 4 pages, excluding **attachments e.g. draft bills of costs, case law, etc)** are due by September 27, 2024, with GNE's due October 11, 2024. [para 137] [emphasis added]

[51] On the latter point, see also ***Lynx Integrated Solutions Corp v 2031783 Alberta Ltd***, 2023 ABKB 271 (Mah J.) (para 8); ***Camacho v Lacroix***, 2024 ABKB 179 (Devlin J.) (para 9); ***Aubin v Condominium Plan No 862 2917***, 2024 ABKB 345 (Mandziuk J.) (paras 26-32); and ***Seibel v Alberta (Director of Child and Family Services)***, 2024 ABKB 520 (my decision) (paras 16-18).

[52] Accordingly, even if enhanced costs had been warranted, basing them on a percentage (70 or otherwise) of paid-but-not-gauged-for-reasonableness legal fees would not have been appropriate.

IV. Schedule C costs

[53] The respondents alternatively asked for "Schedule C, Column 5 Costs with a multiplier of 5, consistent with ... ***Ardmore Properties Inc v Sturgeon School Division School Division No. 24***, 2022 ABKB 674, which would amount to $486,625.00. ... "

[54] The cited decision is Neilson J.'s substantive decision in that case, where he dismissed the plaintiff's bid for a mandatory injunction shutting down and directing clean-up of a waste-

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management site and granted the defendant's bid for summary dismissal of the plaintiff's $32-million damages claim.

[55] His unreported costs decision (upheld in 2024 ABCA 88) came via letter to counsel dated May 1, 2023, a copy of which the respondents provided in their materials. In his decision, Neilson J. emphasized the massive damages claim and the "large sums" the defendant would have had to pay to decommission the site and install remedial infrastructure, all aside from having to temporarily close two schools for that work.

[56] Relying on those factors and the complexity of the litigation, Neilson J. concluded that "an award of a multiple of Column 5 of Schedule C by a factor of 5 results in a fair partial indemnity of the Defendant's costs in this action."

[57] Total billed fees were $681,711.00. Column 5 fees amounted to $66,015.00. Multiplied by 5, total Column 5 fees came to $330,075.

[58] I do not see the ***Ardmore*** circumstances as comparable, particularly where the defendant had been facing a damages claim of $32 million and massive expenses of its own for the sought remedial work. Claims in that zone clearly warranted Column 5 x 5 treatment.

[59] Here see ***LAPP Corporation v Alberta***, 2025 ABKB 33, which reviewed when 5x and similar multipliers are warranted, building on the case-law survey in ***Stewart Estate v TAQA North Ltd***, 2016 ABCA 144 (paras 38-49 of ***LAPP***).

[60] Per ***Stewart Estate***:

> … Alberta courts have typically awarded a multiplier of the tariffs in Column 5 in three circumstances: when the **complexity** of the action warrants it, when the **amount in dispute significantly exceeds the $1.5 million threshold for Column 5** [now $2 million] or when the **conduct** of one of the parties warranted a multiplier. However, generally, courts also rely upon the other considerations set out in Rule 10.33 in determining whether a multiplier should be applied. ... [para 25]

[61] As discussed earlier, I do not see complexity or conduct reasons for imposing a multiplier here.

[62] As for amount in issue, no amount was directly at issue, with the focus on whether the 2023 injunction should be extended for a further ten months. On this point, see the annotated survey of multiplier cases in ***LAPP*** (paras 41-46).

[63] Accordingly, Great North could have argued for Column 1 treatment, which applies not only to claims "up to and including $75,000" but also "[u]nless the Court orders otherwise, matters that have no monetary amounts, for example, injunctions will be dealt with under Column 1." And for no multiplier.

[64] In any case, Great North reasonably proposed Column 5 treatment and a 1.5 multiplier, finding guidance in Mah J.'s costs decision in two employment-related injunction cases. The first is ***Orbis Engineering Field Services v Taifa Engineering Ltd***, 2019 ABQB 592, where Column 5 x 1.5 costs were directed in the following circumstances:

- the Respondents were **completely successful** in resisting the injunction application;

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- the **allegations** on which the application was based **impugned the integrity of professional persons** in a particular industry and thus the issue was important to them;
- in the end result, there was no demonstrated urgency to the application and Orbis acted only on **suspicion, much of which was not well-founded**;
- Orbis **failed to provide adequate notice** to the Respondents and refused to adjourn the June 11, 2019 application, thus seriously disadvantaging the Respondents from responding in as meaningful a manner as they could on that date; and
- only through a fortuitous conflict were the Respondents not forced to go ahead on June 11, 2019, allowing them to regroup for June 25, 2019. [para 25] [emphasis added]

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[65] The second is ***Lynx Integrated Solutions Corp v 2031783 Alberta Ltd*** (cited above) featuring these key factors:

> Mr. Savage deposed in affidavit to a **$6.5 million business loss** as a result of Varo using the separators. This figure was not contested. Accordingly, it is **appropriate to use Column 5 as opposed to Column 1**. Further, having regard to the **complexity** of the matters in issue, the **volume of material** submitted, the **number of steps required** to get the matter where the application before me could me made (as set out in Lynx's costs submission), I am of the view that some sort of enhancement or multiplier is warranted to reflect the shortcomings in a pure application of Schedule C and to provide a more reasonable measure of indemnity: *McAllister v Calgary (City),* 2021 ABCA 25 at para 33.
>
> … I … rely on **Column 5** of Schedule C and apply a **multiplier of 2X** on the fee portion. [paras 7 and 9] [emphasis added]

[66] Great North also cited ***Shefsky v California Gold Mining Inc***, 2015 ABQB 525 (paras 25-29 and 34), which "involve[ed] a two-day Special Chambers application involving numerous affidavits and transcripts concerning an oppression claim", where a request for a multiplier on Column 5 was denied.

[67] Great North argued:

> … the most relevant case for this matter is the ***Orbis*** decision and … Column 5 and a multiplier of 1.5 is appropriate [here]. …

[68] I agree, for the reasons outlined above.

[69] As for the applicable Schedule C items (e.g. Oral Questioning, Applications Contested, etc) and the amounts properly claimable under each, I accept and approve Great North's Costs Schedule (Appendix A to its costs submission), finding that its footnoted comments, including refinements to the respondents' draft proposal concerning (for example, the number of counsel involved on a given step), are accurate.

[70] The net result is Schedule C, Column 5 costs of $54,675. Multiplied by 1.5, the total Schedule C fees become $82,012.50.

[71] In recognition of Great North's general success in the interlocutory applications described under "Deductions for Great North's Success on [certain] Interlocutory Matters" in its costs brief, I deduct the amount of $12,012.50 from the above fees award, leaving $70,000 payable by Great North on a net basis.

[72] On disbursements, the respondents asked for "full indemnity disbursements", with no particulars. Great North did not address disbursements.

[73] If the parties are unable to agree on the disbursements figure, they can seek an assessment-officer ruling.

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V. Costs for Rule 6.8 witnesses

[74] The respondents also seek costs for three non-party witnesses examined by Great North under Rule 6.8, which provides:

> A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and
>
> (a) rules 6.16 and 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

[75] Rules 6.16 to 6.20 address "Contents of notice of appointment", "Payment of allowance", "Lawyer's responsibilities", "Interpreter", and "Form of questioning and transcript", respectively.

[76] Per the respondents:

> … non-parties to litigation should not be forced to bear costs associated with the inconvenience of being examined, when actual parties could have been examined. The Rule 6.8 Witnesses had to respond to an application to compel undertaking responses, which the Court [in ***Great North Equipment Inc v Penney***, 2024 ABKB 391 (Feasby J.)] found [Great North was] not entitled to, and that the undertaking requests were "too intrusive and onerous."

[77] Feasby J. decided costs of that application should be determined by the justice hearing the injunction-extension application, hence this request as part of the costs exercise here.

[78] Per Great North:

> … the Rule 6.8 Witnesses' costs … should not be granted at all. …
>
> [These] witnesses were served with the requisite conduct money. They are not parties to this proceeding and faced no liability as a result of their Questionings. They did not obtain independent counsel; either Paloma or they chose to use counsel to Paloma. No separate costs are warranted for the Rule 6.8 Witnesses participating in their examinations or for responding to Great North's application to compel undertakings responses from them (which is claimed separately by the Paloma Respondents in Appendix B to the Respondents' costs submissions).

[79] Here is Rule 6.17 on the allowance (or conduct money):

> **(1)** When a notice of appointment for questioning is served, an **allowance must be paid by the questioning party to or on behalf of the person** to be questioned, unless the Court dispenses with an allowance.
>
> **(2)** If an allowance is not paid, the person who is the subject of the notice of appointment for questioning need not attend the appointment unless ordered to do so by the Court.
>
> **(3)** The allowance to be paid is
>
> (a) the **amount determined under Schedule B**, or
>
> (b) if there is a **dispute over the amount to be paid, the amount ordered by the Court.**

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[80] Division 3 of Schedule B (Allowances Payable to Witnesses in Civil Proceedings) outlines the amounts payable to witnesses for their examination attendance including, as applicable, reimbursement of travel, accommodation, and meal expenses.

[81] The respondents did not contest Great North's position that the Rule 6.8 witnesses were paid the required conduct money for attending the examinations.

[82] Neither party cited any case bearing on costs (i.e. beyond conduct money) for such witnesses.

[83] In ***Wang v Alberta***, 2022 ABCA 79, the Court of Appeal held that costs can be awarded to non-parties albeit in narrow circumstances:

> During oral argument, the appellants argued that given the case management judge's conclusion that AHS was not a party to the action and did not need to be named in the style of cause, the case management judge had no authority to award costs in favour of AHS because Rules 10.29-10.34 of the *Alberta Rules of Court* provide guidance about awarding costs to a "party".
>
> As neither the appellants nor AHS provided written argument on this legal issue, they were granted leave to prepare and file further written arguments. We have reviewed these materials and are satisfied that, **while these circumstances are rare, there is jurisdiction to award costs in favour of non-parties to the action** based on s. 21 of the *Court of Queen's Bench Act*, RSA, 2000, c C-31, *Jones v Green* (1995), 1995 CanLII 9223 (AB KB), 176 AR 94, [1996] 2 WWR 681 (Alta QB) and the definition of "party" in Rule 10.28.
>
> The issue remains whether the case management judge's decision to award costs, and the magnitude of those costs, was supported by law. [paras 19-21] [emphasis added]

[84] Here is s 21 of the Court of King's Bench Act:

> Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the **discretion of the Court or judge** and the Court or judge may make **any order relating to costs that is appropriate in the circumstances**. [emphasis added]

[85] Here is Rule 10.28:

> In this Division [2 – Recoverable Costs of Litigation], "party" includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award.

[86] Accordingly, with costs possible in favour of non-parties, the question becomes whether they should be granted and, if so, on what scale (e.g. full-indemnity, partial indemnity, Schedule C, etc.) and in what amount.

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[87] Here the respondents did not break out the legal fees paid by the Rule 6.8 witnesses. Instead, they grouped them with the legal fees paid by one of the individual defendants (Mr. Monilaws), as reflected in this excerpt from their costs submission:

> Combin[ing the 70-per-cent-indemnity costs claim of $498,769.13] with the full indemnity claimed in respect of Mr. Monilaws and the Rule 6.8 Witnesses, the Respondents' total costs claim (exclusive of disbursements/charges) is in the amount of $593,533.88.

[88] Subtracting $498,769.13 from $593,533.88 leaves $94,764.75 as the combined full-indemnity costs claim of Mr. Monilaws and the three Rule 6.8 witnesses.

[89] As with their partial indemnity claim for $498,769.13, the respondents did not provide statements of account, time records, or other information by which the reasonableness of the $94,764.75 claim could be gauged.

[90] With no evidence of how much each of the Rule 6.8 witnesses paid in legal expenses or backdrop information to gauge the reasonableness of those expenses, the claim for full-indemnity recovery is disallowed.

[91] In passing, I note that, if that evidence had been provided, those witnesses would have had an arguable entitlement to recovery of their full (reasonable) legal expenses related to the application before Feasby J. It is hard to conceive why they, as outsiders to the litigation, should be out-of-pocket any amount for a proceeding aimed at imposing production and undertaking obligations found not to apply to them.

[92] It may be different for the examinations themselves, where Rule 6.16 (conduct money) may be found to provide exhaustive recovery.

[93] For more on costs in favour of non-parties, see *Orkin on The Law of Costs* (Second Ed. (looseleaf ed. – current to Rel 1, 3/2024), Mark M. Orkin (Thomson Reuters) at 2:77 (Person not a Party – Costs in Favour of a Non-Party).

[94] In any case, Schedule-C-wise, I note that both sides included claims for attendance at the three Rule 6.8 examinations and for the compel-answers-and-undertakings application before Feasby J.

[95] That is, Great North is prepared to recognize at least Schedule-C-level cost claims for both the examinations and the application before Feasby J. Even if that recognition was aimed at the costs of counsel for the Paloma entities and the individual defendants i.e. for their participation on behalf of those parties at the Rule 6.8 examinations i.e. if Great North (per its position above) is opposed to any costs for the Rule 6.8 witnesses themselves.

[96] As with the respondents' main costs claim, I adopt and approve Great North's proposed treatment of those examinations and that application.

[97] In other words, I decline to approve any greater costs recovery on the Rule 6.8 front than as reflected in Great North's costs schedule.

VI. Conclusion

[98] For all these reasons, costs of the injunction-extension application and the Feasby J. application are awarded to the respondents as outlined in Great North's costs schedule, with the offset described above, yielding a net costs amount of $70,000.00

[99] I also award Great North costs of $5,000 for its overall success on this costs determination, yielding a net net amount owing by Great North of $65,000.

[100] As discussed above, any dispute over disbursements shall be referred to an assessment officer.

[101] I thank the parties for their helpful costs submissions.

Heard by way of written submissions dated September 27, October 11, and October 18, 2024.
Dated at Calgary, Alberta on January 24, 2025.

Michael J. Lema
J.C.K.B.A.

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