

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *SaltWire Network Inc. v. Groupe Des Médias Transcontinental de la Nouvelle-Écosse Inc.*, 2024 NSSC 65

**Date:** 20240305  
**Docket:** 487088  
**Registry:** Halifax

**Between:**

SaltWire Network Inc.

*Plaintiff*

v.

Groupe des Médias Transcontinental de la Nouvelle-Écosse Inc./  
Transcontinental Nova Scotia Media Group Inc., Groupe Des Médias  
Transcontinental des Provinces de l'Atlantique S.E.N.C./  
Transcontinental Atlantic Media Group G.P., Imprimeries Transcontinental Inc./  
Transcontinental Printing Inc., Imprimeries Transcontinental 2005 S.E.N.C./  
Transcontinental Printing 2005 G.P., and Optipress Printing G.P./  
Impimeries Optipress S.E.N.C.

*Defendants*

**Motion for Security for Costs**

**Judge:** The Honourable Justice Gail L. Gatchalian  
**Heard:** January 24, 2024, in Halifax, Nova Scotia  
**Counsel:** Gavin Giles, K.C. for the Plaintiff  
John Boyle and Katie O'Keefe, for the Defendants

**By the Court:**

**Introduction**

[1] This is a motion for security for costs.

[2] The Plaintiff is SaltWire Network Inc. SaltWire is a Canadian newspaper publishing company that owns newspapers in Atlantic Canada.

[3] The Defendants are Groupe des Médias Transcontinental de la Nouvelle-Écosse Inc./Transcontinental Nova Scotia Media Group Inc., Groupe Des Médias Transcontinental des Provinces de l’Atlantique S.E.N.C./Transcontinental Atlantic Media Group G.P., Imprimeries Transcontinental Inc./Transcontinental Printing Inc., Imprimeries Transcontinental 2005 S.E.N.C./Transcontinental Printing 2005 G.P., and Optipress Printing G.P./Impimeries Optipress S.E.N.C. (collectively, “Transcontinental”).

[4] In April of 2017, SaltWire purchased certain newspaper publishing assets located in Atlantic Canada from Transcontinental. On April 10, 2019, SaltWire commenced an action against Transcontinental concerning the Asset Purchase Agreement. SaltWire alleges that:

- (a) Transcontinental made misrepresentations and breached certain representations and warranties in the Asset Purchase Agreement.
- (b) Transcontinental breached the related Transitional Services Agreement, which set out the services that Transcontinental would provide SaltWire for a period of time after the execution of the Asset Purchase Agreement.
- (c) Transcontinental failed to complete certain environmental undertakings related to the Asset Purchase Agreement.

[5] SaltWire claims general and special damages from Transcontinental, indemnification for the environmental undertakings, aggravated damages, punitive damages and contractual prejudgment interest. SaltWire has not yet formally quantified its special damages claim. However, in a letter dated August 7, 2018, Ian Scott, SaltWire’s Chief Operating Officer, estimated the losses as of that date at approximately \$15 million.

[6] Transcontinental seeks an order for security for costs under Civil Procedure Rule 45. Rule 45.01(1) allows for security for costs to be ordered as a “remedy for a party who defends” a claim and who will “experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.” Transcontinental has filed a defence.

[7] Under Rule 45.02(1), a judge may order a plaintiff to post security for costs if four factors are established:

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

- (a) the party who makes a motion for the order has filed a notice by which the claim is defended or contested;
- (b) *the party will have undue difficulty realizing on a judgment for costs, if the claim is dismissed and costs are awarded to that party;*
- (c) the undue difficulty does not arise only from the lack of means of the party making the claim;
- (d) in all the circumstances, it is unfair for the claim to continue without an order for security for costs.

[emphasis added]

[8] Rule 45.02(3)(c) creates a rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgment for costs:

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

...

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

...

[9] Transcontinental says that SaltWire is a corporation not appearing to have sufficient assets to satisfy a judgment for costs because:

- (a) SaltWire is in default of the loan agreement between it and the entity that financed SaltWire's purchase from Transcontinental (the "Senior Lender"), the Senior Lender has a registered security interest in all of SaltWire's real and personal property in Atlantic Canada, and the security of the Senior Lender would rank in priority to any costs awarded to Transcontinental.
- (b) On January 22, 2020, the Canada Revenue Agency registered a Certificate against SaltWire's Nova Scotia real property in the amount of \$3,079,978.88 plus interest, and SaltWire still owes \$1,850,000 on that debt. The Canada Revenue Agency also has a registered security interest in all of SaltWire's present and after-acquired personal property in Nova Scotia.

[10] Transcontinental states that, pursuant to Civil Procedure Rule 45.02(3)(c), these two debts create a rebuttable presumption that Transcontinental will have undue difficulty realizing on a judgment for costs and that the difficulty does not arise only from SaltWire's lack of means.

[11] Transcontinental relies on an affidavit of John Boyle, one of its legal counsel, in support of the motion.

[12] Transcontinental relied on a number of authorities, including: *Quadrangle Holdings Limited v. Coady Estate*, 2018 NSSC 349; *Hebron Hospitality Group Inc. v. 778938 Ontario Ltd.*, 2018 NSSC 195; *Ketler v. AGNS*, 2016 NSCA 15; *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297; *Septic Pumping*

*Services v. ABCO Industries Ltd.*, 2019 NSSC 344; *Armoyan v. Armoyan*, 2014 NSSC 143; and *Elph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316, aff'd *Aliant Inc. v. Elph.com Solutions Inc.*, 2012 NSCA 89.

[13] In response, SaltWire says that Transcontinental has failed to show that SaltWire appears not to have sufficient assets to satisfy a judgment for costs if the defence is successful, and that SaltWire has rebutted any presumption that Transcontinental will have undue difficulty realizing on a judgment for costs. SaltWire says that it is a solvent company, with a regular revenue stream, with staff, property and other assets, fully able to meet all of its financial obligations as they become due. SaltWire says that there are no outstanding costs orders against it, the Canada Revenue judgment has been reduced by more than \$1 million, Canada Revenue is not taking active collection efforts against SaltWire, SaltWire's debt to the Senior Lender is the subject of a forbearance agreement, and SaltWire is in compliance with the terms and conditions of that forbearance agreement.

[14] SaltWire relies on the Affidavit Mr. Scott, its Chief Operating Officer.

[15] SaltWire distinguished the authorities relied on by Transcontinental by saying that “[w]ithout exception, all of these authorities address impecuniosity as a possible remedy to a Motion for an Order for Security for Costs, or they speak to

plaintiffs which were acting in insolvent manners as regards their potential exposure to costs consequences, or, as in the case of one of the authorities, the responding party to a Motion for Security for Costs, was a scoundrel who had brought to a high art form the hiding of his assets from his former spouse, and to a large extent, from his dependent children too.”

[16] At the commencement of the hearing of the motion, Transcontinental objected to the admissibility of several paragraphs of Mr. Scott’s affidavit. I heard argument, and reserved my decision. As will become evident, it is not necessary for me to decide the admissibility objections, as they will not affect the outcome of this motion.

[17] In order to determine whether I should exercise my discretion to order that SaltWire post security for the potential award of costs against it, I will consider the following:

1. The evidence of SaltWire’s solvency, operations, assets, expenses, revenue and liabilities.
2. The debt to the Senior Lender.
3. The debt to Canada Revenue Agency.
4. Whether Transcontinental has established that SaltWire does not appear to have sufficient assets to satisfy a judgment for costs.

5. If so, whether SaltWire has rebutted the presumption that Transcontinental will have undue difficulty realizing on a judgment for costs.
6. If not, is it fair to order security for costs?
7. If so, what amount of costs should SaltWire post?

[18] I will keep in mind the following principles in applying Rule 45.02(1):

- The rule is discretionary as a judge “may” order security for costs if various parts of the test are met: *Quadrangle Holdings Ltd. v. Coady Estate*, 2018 NSSC 349 (Chipman J.) at para.4.
- The judge must balance access to justice with artificial insulation from an award of costs: *Quadrangle*, citing *Ellph.com Solutions Inc. v. Aliant Inc.*, 2011 NSSC 316 (Moir J.) at para.21, aff’d 2012 NSCA 89.
- Rule 45.02 provides a broad discretion. The limit on the judge’s discretion is not severe. The judge has a free hand to do what is just, as long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair [Rule 45.02(1)] or establishes special grounds [Rule 45.02(4)]: *Ellph.com* at para.21, citing *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 (Goodfellow J.) at para.19.
- The court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward: *Ellph.com* at para.21.
- Rule 45.02(1)(c) reinforces the principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court: *Ellph.com* at para.21.
- The judge must be satisfied about the justice of ordering security for costs, as reflected in the rule’s express requirement for fairness. The requirement

for a circumstantial inquiry into fairness is found in the words “in all the circumstances”: *Ellph.com* at para.21.

### **Evidence of SaltWire’s Solvency, Operations, Assets, Expenses, Revenue, Liabilities**

[19] SaltWire relies on the following assertions made by Mr. Scott in his affidavit to say that Transcontinental has failed to establish that SaltWire does not appear to have sufficient assets to satisfy a judgment for costs, as well as to say that SaltWire has successfully rebutted the presumption that Transcontinental will have undue difficulty realizing on a judgment for costs:

- SaltWire is currently a solvent company, fully able and capable of meeting all of its financial obligations as they come due: para.9.
- SaltWire is an operating company with owned and leased premises, vehicles of different types, other assets, employees, business operations which produce a consistent revenue stream, and is not in any manner a “nominal party”: para.13.
- In addition to its business operations which produce a consistent revenue stream, SaltWire owns several pieces of real property: a building in Sydney, Nova Scotia, appraised at a minimum value of \$2 million, a building in Yarmouth, Nova Scotia, appraised at a minimum value of \$300,000 and a building in St. John’s, Newfoundland and Labrador, appraised at a minimum value of \$5.4 million: at para.15.
- Though subject to mortgages, the mortgage on each one of these several pieces of real property are current and have been kept current: at para.16.
- Because of a recent change to federal tax legislation relating to the newspaper publishing industry in Canada and known as the “Federal Journalism Labour Tax Credit,” SaltWire will receive an additional annual

income tax refund of approximately \$1 million, which SaltWire expects will be applied to the \$1,850,000 balance owed to the Canada Revenue Agency: at para.25.

- SaltWire expects to receive between \$2 million and \$2.5 million annually as its share of the \$100 million per year that Google has agreed to pay to members of the Canadian journalism industry in its negotiations with the federal government pursuant to the *On-Line News Act*: at paras.26-27.
- SaltWire and the Senior Lender are parties to a written forbearance agreement, the provisions, terms and conditions of which are and have consistently been maintained current by SaltWire: at para.28.

### **The Debt to the Senior Lender**

[20] The Senior Lender, Integrated Private Debt Fund V LP, lent funds to SaltWire under a loan agreement dated April 12, 2017: Affidavit of Mr. Boyle, para.4. The loan agreement is not in evidence.

[21] SaltWire paid \$23,350,000 to Transcontinental: SaltWire's Notice of Defence to Counterclaim, paras.2 and 3.

[22] Although Transcontinental asserts that the outstanding debt likely constitutes most, if not all, of the \$23,325,000 payment for the assets, there is insufficient evidence to establish how much of the purchase price was financed by the Senior Lender, or how much of the loan is outstanding.

[23] However, pursuant to the loan agreement, the Senior Lender has mortgages on all of SaltWire's Nova Scotia real property in Atlantic Canada and it has registered a security interest in all of SaltWire's present and after-acquired personal property including, without limitation, all proceeds thereof or derived therefrom in Atlantic Canada: Affidavit of Mr. Boyle, paras.5-10.

[24] Any cost award issued in favour Transcontinental would therefore rank below the Senior Lender.

[25] On March 29, 2018, Transcontinental received a notice from the Senior Lender that SaltWire was in default of the loan agreement with the Senior Lender: SaltWire's Notice of Defence to Counterclaim, para.7.

[26] The Senior Lender advised Transcontinental that it was not to obtain any payment from SaltWire pursuant to the promissory note held by Transcontinental: SaltWire's Notice of Defence to Counterclaim, para.7.

[27] This would remain the case until the debt owed by SaltWire to the Senior Lender was paid in full in cash or until any agreement or obligation on the part of the Senior Lender to make further financial accommodation to SaltWire has been terminated as confirmed in writing by the Senior Lender to Transcontinental: SaltWire's Notice of Defence to Counterclaim, para.7.

## **The Debt to CRA**

[28] On January 22, 2020, the Canada Revenue Agency registered a Certificate against SaltWire's Nova Scotia real property in the amount of \$3,079,987.88 plus interest accruing since August 9, 2019: Affidavit of Mr. Boyle, para.17.

[29] The Certificate has the same effect as if it were a judgment obtained in the court: Affidavit of Mr. Boyle, para.17.

[30] SaltWire still owes approximately \$1,850,000 on that debt: Affidavit of Mr. Scott, para.24.

[31] The Canada Revenue Agency certificate remains in place: Affidavit of Mr. Boyle, para.19.

[32] The Canada Revenue Agency also has registered a security interest in all present and after-acquired personal property of SaltWire in Nova Scotia: Affidavit of Mr. Boyle, para.10.

[33] Therefore, any cost award issued in favour Transcontinental would rank below the Canada Revenue Agency.

## **Does SaltWire Appear Not to Have Sufficient Assets to Satisfy a Judgment for Costs?**

[34] SaltWire's claim is large. Mr. Scott estimated its claim at approximately \$15 million only one year after executing the Asset Purchase Agreement. That estimate did not include additional losses claimed post-August of 2017, and aggravated and punitive damages. Furthermore, it is reasonable to expect that Transcontinental will incur significant further legal fees, as the litigation is still in early stages.

[35] If SaltWire is unsuccessful, Transcontinental will be entitled to costs of approximately \$975,000 on the basic scale of Tariff A, which is based on the conservative estimate of \$15 million.

[36] Any costs award would rank below the security interest of the Senior Lender and the Canada Revenue Agency.

[37] Mr. Scott does not disclose the amount of SaltWire's indebtedness to the Senior Lender. However, it is likely significant, given the amount of the purchase price, the fact that the loan financed the purchase, the fact that the Senior Lender has a security interest in all of SaltWire's real and personal property in Atlantic Canada, and that SaltWire was in default of the loan.

[38] All of SaltWire's real and personal property in Nova Scotia is also encumbered by the security interest of the Canada Revenue Agency. SaltWire still

owes the Canada Revenue Agency \$1,850,000, three years after its Certificate was registered.

[39] Mr. Scott does not identify any unencumbered asset that would be available to satisfy a costs award. He does not identify the amount of equity in SaltWire’s real property or other assets, after taking into account the loan to the Senior Lender, the Canada Revenue judgment, mortgages and other security interests.

[40] Transcontinental has established that SaltWire does not appear to have sufficient assets to satisfy a judgment for costs.

[41] Therefore, under Rule 45.02(3)(c), there is a rebuttable presumption that Transcontinental will have undue difficulty realizing on a judgment for costs that does not arise only, or at all, from SaltWire’s lack of means.

**Has SaltWire Rebutted the Presumption that Transcontinental will have undue difficulty realizing on a judgment for costs?**

***SaltWire is Currently a Solvent Company***

[42] Mr. Scott’s assertion that “SaltWire is currently a solvent company, fully able and capable of meeting all of its financial obligations as they come due” is not supported by any financial details to support that conclusion. The statement that SaltWire is “fully able and capable of meeting all of its financial obligations” is

also contradicted by the Senior Lender’s notice of default and the amount still outstanding to Canada Revenue. Mr. Scott’s assertion that SaltWire is “currently a solvent company” does not rebut the presumption that Transcontinental will have undue difficulty realizing on a judgment for costs due to the fact all of SaltWire’s real and personal property in Atlantic Canada is encumbered by the security interest of the Senior Lender.

***An Operating Company with Premises, Vehicles, Assets, Employees, Revenue Stream***

[43] Mr. Scott’s assertion that “SaltWire is an operating company with owned and leased premises, vehicles of different types, other assets, employees, business operations which produce a consistent revenue stream,” is not supported by any financial details to support that conclusion. The statement does not address the fact that all of SaltWire’s real and personal property in Atlantic Canada is encumbered by the security interest of the Senior Lender.

***SaltWire Owns Several Pieces of Real Property and the Mortgages are Current***

[44] While Mr. Scott’s evidence is that SaltWire owns several pieces of real property and that the mortgages are current, Mr. Scott’s affidavit does not disclose the amount of the mortgages or the amount of equity that SaltWire has in the real property. This evidence also does respond to the fact that all of SaltWire’s real and

personal property in Atlantic Canada is encumbered by the security interest of the Senior Lender.

***Additional Annual Income Tax Refund of Approximately \$1 Million***

[45] Mr. Scott's evidence is that the expected additional annual income tax refund of approximately \$1 million will be applied to the \$1,850,000 balance owed to the Canada Revenue Agency. The refund will not affect the debt owed to the Senior Lender or address the fact that the Senior Lender will rank in priority to any costs award given its security interest over all of SaltWire's real and personal property in Atlantic Canada

***SaltWire Expects to Receive \$2 Million - \$2.5 Million Annually***

[46] Mr. Scott's evidence that "SaltWire expects to receive between \$2 million and \$2.5 million annually as its share of the \$100 million per year that Google has agreed to pay to members of the Canadian journalism industry in its negotiations with the federal government pursuant to the *On-Line News Act*" is speculative, without any supporting facts to assess the likelihood of SaltWire receiving the expected amount or the timing of the payment. Nor does this evidence address the fact of the Senior Lender's security in all of SaltWire's real and personal property, including "after-acquired" personal property.

### ***Forbearance Agreement with Senior Lender***

[47] The forbearance agreement with the Senior Lender does not change the fact that the Senior Lender has a security interest in all of SaltWire's real and personal property.

### ***No Evidence of Indebtedness or Equity***

[48] Mr. Scott does not disclose the amount owed by SaltWire to the Senior Lender or what equity, if any, SaltWire has in any of its assets that would be available to satisfy a costs award in favour of Transcontinental in the approximate amount of \$1 million.

### ***Conclusion re: Rebuttal of Presumption***

[49] The onus is on SaltWire to rebut the presumption that has been made out by Transcontinental, and that rebuttal must be a "dynamic" one. In the recent *Rapid Camp* decision, Norton J. adopted the following analysis in *Royal Bank of Canada v. Colorcars Experienced Automobiles Ltd.*, 2019 NSSC 283 (Gabriel J.) at paras.38-39, as do I:

[38] The use of the word "rebuttable presumption" in *Rule* 45.02(3) means, of course, that it is open to Mr. Early and Colorcars to rebut the presumption noted. ACJ Smith (as she then was) noted in *Ocean v. Economical Mutual Insurance Company*, 2011 NSSC 408, that the rebuttal process requires provision of "detailed evidence of [their] financial

position including not only [their] income, assets and liabilities, but also [with respect to their] capacity to raise security."

[39] I am in respectful agreement. It is obvious that the process of "rebuttal" must be a dynamic one. Some effort must be expended by Mr. Early and Colourcars to "rebut", otherwise the word is bereft of any meaning. (See also *Armoyan v. Armoyan*, 2014 NSSC 143, at paras.32-37)

[50] It may very well be that SaltWire has sufficient assets to satisfy a judgment for costs if Transcontinental's defence is successful. However, SaltWire has not established, on the evidence, that this is so. SaltWire chose to adduce very limited, unparticularized evidence in its attempt to rebut the presumption that Transcontinental will have undue difficulty realizing on a judgment for costs. SaltWire failed to provide detailed evidence of its financial position, including its income, assets and liabilities, and evidence of its capacity to raise security, in the face of the Senior Lender's all-encompassing and overriding security interest.

[51] SaltWire has failed to rebut the presumption that Transcontinental will have undue difficulty realizing on a judgment for costs

### **Is it fair to order security for costs?**

[52] I agree with the position of Transcontinental that, in all of the circumstances, it would be unfair to proceed without security for costs. SaltWire's claim against Transcontinental is large. The potential costs award, should Transcontinental's defence succeed, will likely approach \$1 million. SaltWire defaulted on a

substantial loan from the Senior Lender, resulting in a forbearance agreement. The security interest of the Senior Lender will rank in priority to any costs award in favour of Transcontinental. SaltWire has had a significant, outstanding debt to the Canada Revenue Agency for some time. Transcontinental has given SaltWire every reasonable opportunity to satisfy it, and the Court, that it has sufficient assets or income to satisfy a potential costs award against it: see the Affidavit of Mr. Boyle at paras.11-16. SaltWire either cannot do so or has chosen not to do so. On the evidence, SaltWire is effectively insulated from costs given the priority of the pre-existing debts. Moreover, SaltWire does not claim that an order for security for costs would stifle its claim against Transcontinental.

### **What Amount of Costs should SaltWire Post?**

[53] Under Rule 45.03(1), an order for security for costs may be in an amount equal to or lower than that estimated for the potential award of costs.

[54] It is reasonable to require SaltWire to post half of the expected costs amount, or \$500,000, as security for costs. See *Hebron Hospitality Group Inc. v. 778938 Ontario Ltd.*, 2018 NSSC 185 at para.28; *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297 at paras.110-117; and *Septic Pumping Services v. ABCO Industries Ltd.*, 2019 NSSC 344 at paras.138-143.

**Conclusion**

[55] The motion is granted. SaltWire is ordered to provide Transcontinental with security for costs in the amount of \$500,000 no later than April 30, 2024 as a condition to proceeding with its claim. If the parties cannot agree on the form of security, SaltWire shall pay the amount of security into court no later than April 30, 2024.

[56] If the parties cannot agree on the costs of this motion, I will receive written submissions from them within two weeks of this decision.

[57] Counsel for Transcontinental is to prepare the draft order.

Gatchalian, J.