Court of King's Bench of Alberta

Citation: Geophysical Service Incorporated v Canadian Natural Resources Limited, 2025 ABKB 60

Date: 20250131
Docket: 2001 07678
Registry: Calgary

Between:

Geophysical Service Incorporated

Plaintiff/Respondent/Cross-Applicant

- and –

Canadian Natural Resources Limited and Companies A-Z

Defendants/Applicant/Cross-Respondent

Reasons for Decision
of the
Honourable Justice J.C. Price

I. Introduction

[1] In my decision reported as ***Geophysical Service Inc v Canadian Natural Resources Ltd***, 2024 ABKB 491 (the "Decision"), I granted an application by Canadian Natural Resources Limited ("CNRL") for summary dismissal of claims filed by Geophysical Services Incorporated ("GSI") and I dismissed GSI's application for summary judgment.

[2] The parties have been unable to agree on costs and therefore, as I directed in the Decision, they have provided me with written submissions.

II. Analysis

A. Entitlement

[3] To begin with, GSI asserts at three separate points in its costs submissions that CNRL should not be entitled to any costs in this Action. At para 68 of the Decision, I specifically stated that, as the successful party, CNRL was entitled to costs. My direction to the parties was to provide

written submissions in the event that they were unable to agree on the amount of those costs. Therefore, this argument is without merit.

B. Approach to Costs

[4] GSI agrees with CNRL's statement in its submissions that costs are in the discretion of the Court and can be approached by reference to Schedule C or assessed as a percentage of costs incurred. However, GSI takes issue with CNRL's statement that the Court of Appeal held in ***McAllister v Calgary***, 2021 ABCA 25 that the usual range of indemnification in commercial matters is 40-50%. Instead, GSI asserts that "...the Court of Appeal in ***McAllister*** clearly stated that it was not defining the level of indemnification in any given case; indeed, that level could be higher or lower than 40-50% depending on how the litigation was conducted and other factors not necessarily having anything to do with the conduct of the litigation."

[5] While the Court of Appeal at para 51 of ***McAllister*** specifically "refrain[ed] from defining with any precision the level of indemnification required in any given case", they also referred at para 45 to the "40-50% partial indemnification guideline, which has been utilized for a number of years as providing a reasonable level of indemnification". They went on to state at para 51 that "As a general principle, we see no reason to depart from the 40-50% level of indemnification approved by this Court in ***Weatherford CA*** and ***Hill v Hill***." Thus, it is clear that, if I adopt the ***McAllister*** approach to costs in this matter, I can award what I consider to be the appropriate level of indemnification, which may or may not fall within the 40-50% range.

[6] On the other hand, I agree with GSI that post-***McAllister***, costs still can be awarded based on Schedule C: ***9344-7167 Quebec Inc v True North Mortgage Inc***, 2024 ABKB 443. CNRL does not dispute this and, indeed, provided a Bill of Costs based on Schedule C, though it asserts that the ***McAllister*** approach is applicable given "the procedural complexity of this Action and the involvement of two parties equally capable of assessing litigation risk".

C. The Parties' Positions

[7] With that background, the parties took vastly disparate positions with respect to the quantum of costs payable to CNRL. CNRL provided an affidavit indicating that its total fees incurred were $618,224.58. It argues that, in the circumstances of this case, it should receive at least 75% of this amount. Alternatively, CNRL provided a Bill of Costs computed on Column 5 of Schedule C and submits that this Court has discretion to use whatever multiplier it deems fit.

[8] For its part, GSI argues that CNRL should be limited to costs based on Schedule C. In its written submission, it takes no position on either the appropriate column or on any multiplier.

D. Rule 10.33 Factors

[9] Pursuant to Rules 10.29 and 10.31 of the Rules of Court, a successful party is entitled to reasonable and proper costs. To determine the quantum of reasonable and proper costs, I must consider the factors enumerated in Rule 10.33. Both CNRL and GSI spoke to these factors in their written submissions. As GSI followed CNRL's enumeration of the relevant factors, I will proceed in the same manner.

1. Result of the Action and Degree of Success (Rule 10.33(1)(a))

[10] CNRL argues that it was entirely successful in that I granted its application for summary dismissal and dismissed GSI's application for summary judgment. As noted above, I found in the Decision at para 68 that CNRL was entitled to costs and I reject GSI's argument to the contrary.

2. Amount Claimed and Recovered (Rule 10.33(1)(b))

[11] CNRL notes that GSI's claim was for $43 million and argues that GSI persisted in that claim when it should have known its arguments were not meritorious.

[12] GSI counters that the amount of its claim was determined by expert opinions and was not "a made-up number". It asserts that the quantum of its claim does not support enhanced costs because it was determined by the volume of seismic data in CNRL's possession, which data GSI argues would not have been returned but for this Action.

[13] Neither party's argument is relevant to how this factor should be addressed. This factor provides the Court with an indication of the reasonableness of the costs sought. In my view, the amount claimed sets the tone for the amount of costs to be awarded. The greater the amount claimed, typically the more money expended by parties to prosecute and defend. For example, if GSI claimed $500,000 and CNRL expended in excess of $600,000 to defend, that would speak volumes as to whether the amount of costs CNRL sought was reasonable. In this case, given the amount claimed by GSI, costs would fall under Column 5 of Schedule C. Clearly, given the amount claimed, the stakes were high, and in the circumstances, I have no doubt that both parties incurred significant legal expense.

3. Unfounded, Harmful Allegations of Misconduct (Rule 10.33(1)(c), (2)(a), (d))

[14] CNRL points out that GSI made serious accusations of deliberate theft, concealment and misuse of seismic data against it and against certain of its employees, who were specifically identified. GSI also accused CNRL's affiants of knowingly or recklessly tendering false evidence. CNRL argues that these accusations were harmful to its corporate reputation and to the personal reputations of the identified employees.

[15] GSI argues that these allegations were not unfounded. In its submission, it states that "It was determined that these affidavits were incorrect; Your Ladyship just characterized them as mistakes. These allegations do not support enhanced costs being awarded to CNRL, especially for its false affidavits."

[16] I find GSI's argument somewhat difficult to understand. At paras 36-37 of the Decision, I found that CNRL's affidavits, while incorrect, were mistaken rather than fraudulent. I also found at para 64 that GSI had not established that CNRL had used the seismic data in question. Therefore, GSI's allegations of *deliberate* theft, concealment and misuse of seismic data were indeed unfounded, notwithstanding their genesis in CNRL's mistaken affidavits.

4. Persisting in Unsubstantiated Fraud Allegations (Rule 10.33(1)(g), (2)(a), (g))

[17] CNRL cites ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 and acknowledges that not all unfounded allegations of fraud or dishonesty will lead to an award of solicitor-client costs. However, CNRL argues that GSI acted unreasonably by persisting in its allegations of fraud after having been provided with an explanation for CNRL's possession of seismic data and mistaken affidavits. CNRL's position is that this should result in enhanced costs in its favour, citing ***Prevatt v Prevatt***, 2024 ABKB 386 and ***Myers v AlanRidge Homes Ltd***, 2019 ABQB 65.

[18] GSI cites ***Open Window*** as well, noting that the Supreme Court of Canada held at para 26 that an unsuccessful attempt to prove fraud or dishonesty "does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to 'reprehensible, scandalous or outrageous conduct'."

[19] GSI also cites ***Abt Estate v Ryan***, 2020 ABCA 133 for the proposition that enhanced costs for failure to prove fraud should be reserved for the most egregious cases, such as intentional false allegations of fraud. GSI asserts that it had a reasonable belief in the potential fraud based on CNRL's conduct "with its false evidence".

[20] While I take GSI's point given the inaccurate information initially provided by CNRL, I am satisfied that GSI persisted in its fraud claims beyond the point at which it should have known those claims were unsustainable. I will weigh this in the balance in my costs award.

5. Duplicative Proceedings (Rule 10.33(1)(g))

[21] CNRL contends that this Action is identical to a previous Action filed by GSI; I referred to these in the Decision as the "New Action" and "Old Action", respectively. CNRL argues that duplicative proceedings are an abuse of process and that this duplication weighs in favour of an award of enhanced costs.

[22] GSI argues that the New Action is not duplicative of the Old Action and that the New Action was commenced due to "GSI's discovery that CNRL had submitted three false affidavits and other evidence upon which it reasonably relied to enter into the Consent Dismissal Order."

[23] In the proceedings before me, CNRL sought, *inter alia*, to strike the New Action as being duplicative of the Old Action. I found that it would not be appropriate to do so given GSI's allegation that the Consent Dismissal Order was obtained by fraud. While I found that there was no fraud and granted summary dismissal of the New Action, it was necessary for me to examine the evidence to arrive at that conclusion.

[24] For purposes of costs, I find that, while there was some duplication between the Old Action and the New Action, the matter is more nuanced than the duplication argument indicates. In my view, this is a rather minor factor in this case and is therefore not determinative in my assessment of what is a reasonable amount of costs to award.

6. Settlement Offer (Rule 10.33(2)(h))

[25] CNRL states that it made two ***Calderbank*** settlement offers to GSI. The first, on April 28, 2021, offered to accept a consent dismissal for payment of 50% of CNRL's costs to that date. The second, on January 26, 2022, offered to discontinue the New Action on a without costs basis. CNRL contends that both of these were reasonable, genuine compromises. Since I have granted summary dismissal of GSI's claims and found that CNRL is entitled to costs, CNRL argues that it has fared better than it would have if its later offer had been accepted. CNRL claims to be entitled to double costs for all steps after January 26, 2022. This is reflected in its Bill of Costs.

[26] GSI argues that neither of the ***Calderbank*** offers was a genuine offer to settle. It argues that an offer of settlement must contain an element of compromise and that an offer made without any reasonable expectation that it will be accepted is merely a no-risk litigation strategy or tactic. GSI cites the decision of this Court in ***Geophysical Service Incorporated v Falkland Oil and Gas Limited***, 2019 ABQB 314.

[27] In ***Falkland***, the Court noted that the offer was made two days prior to the defendants filing a statement of defence. The Court found at para 36 that this was "not much of an offer" and went on at para 39 to state that "given the complexity of the issues, and the evidence relevant for resolving them, the timing suggests that the defendants' offer was tactical rather than genuine." The Court found that, at the time the offer was made, the defendants did not yet have access to certain decisions without which they "could not reasonably have viewed GSI's claim as obviously and wholly without foundation."

[28] In my view, the circumstances of this case are very different. The Mystery Boxes (as defined in the Decision) were discovered in December 2020. At para 16 of the Decision, I set out a table of various documents filed in the New Action. For example, as noted in that table, Mr. Mike Hird, who was the Lead, Records Management, Acquisitions & Divestitures, Offsite and Destruction at CNRL, swore an affidavit on January 20, 2021 and was questioned thereon on February 11, 2021. While GSI asserts in its written submissions that, at the time of CNRL's offers, "there was outstanding evidence which needed to be explored in order to assess the strength of GSI's claim", it does not follow that the offers were not genuine attempts at compromise.

[29] There is no specific time prior to which a genuine offer of settlement cannot be made. Indeed, the Court in ***Falkland*** held at para 39 that "Making a formal offer immediately does not in and of itself preclude that offer being genuine." By the time the January 2022 offer was made, CNRL already had been required to take numerous steps and had incurred significant costs. Accordingly, I find that the offer to discontinue without costs was a genuine attempt at compromise. While a ***Calderbank*** offer, unlike a formal offer pursuant to the *Rules of Court*, does not mandate double costs, I will consider the doubling of costs after January 26, 2022, in arriving at my costs award.

III. Reasonableness of the Amount of Lawyers Fees

[30] As noted above, CNRL indicates that its legal fees incurred amount to $618,224.58. These fees have not been assessed by a review officer. CNRL argues such a review is unnecessary in this case. It cites the factors to be considered in determining the reasonableness of a lawyer's charges as set out in *Rule* 10.2 and contends that the issues in dispute were extensive and that the lawsuit

was complex, involving decades of records. It notes that there were numerous steps leading up to the hearing before me. Based on all of this, CNRL asserts that its legal fees were not disproportionate to the issues or to the amount that GSI should be called upon to pay.

[31] In its written submissions, GSI argues as follows:

> ...had CNRL allowed regular discovery to occur, as opposed to everything in this Action occurring under the framework of a summary dismissal or the AVAP Application, there would not have been so many documents filed on the Court record. It is CNRL that created the situation that demanded so many court filed documents, not GSI.
>
> Also, the fact that CNRL's summary judgment application still sought an Apparent Vexatious Application or Proceeding, after Associate Chief Justice Rooke had decided that GSI was not vexatious, further escalated the lengths that GSI needed to go to disprove that it is not vexatious and that this is not a vexatious claim.

[32] It is not clear to me how CNRL's seeking summary dismissal served to lengthen or complicate the proceedings as GSI has posited. In my view, summary dismissal shortens rather than lengthens proceedings. In this case, the summary dismissal application obviated the need for trial. On that basis alone, the parties expended less legal fees to see this matter to its conclusion.

[33] I disagree with GSI's allegation that CNRL complicated the proceedings. The summary dismissal application had to address all of the causes of action and issues that would have been addressed had the matter proceeded to trial. If the action itself is complicated, summary dismissal necessarily may also include complicated issues. Complicated issues are not unnecessarily further complicated by a party bringing a summary judgment application.

[34] In any event, I find that the legal expenses incurred by CNRL to defend the Action and bring it to conclusion by summary dismissal were not unreasonable.

IV. Computation

[35] In arriving at my costs award, I have considered both the Schedule C approach and the ***McAllister*** approach.

[36] Considering ***McAllister*** first, I am of the view that, given GSI's persistence in pursuing its fraud allegations despite the evidence regarding the Mystery Boxes, some enhancement of costs is appropriate. However, I consider CNRL's requested 75% to be excessive. For purposes of computation, I am prepared to assume that CNRL's fees incurred were reasonable, notwithstanding that they have not been reviewed. Using that assumption, 60% of the $618,224.58 incurred amounts to $370,934.74.

[37] Turning to the *Rules of Court* approach, CNRL's Bill of Costs amounts to $50,895 without any doubling for its ***Calderbank*** offer. Doubling the costs after January 26, 2022, leads to a Bill of Costs in the amount of $84,780. Since I have found that CNRL's January 26, 2022, offer was reasonable and a genuine attempt at compromise, I will use the latter figure in my computations.

[38] I am satisfied that a multiplier is appropriate given the length of these proceedings and the complexity of the issues. A multiplier of 4 leads to costs in the amount of $339,120, while a multiplier of 5 would lead to an award of $423,900.

[39] In addition to fees, CNRL claims disbursements totalling $32,778.58 ($34,417.51 with GST). GSI made no arguments in its written submissions in respect of disbursements.

[40] I find that the best approach in this case is to award costs as a lump sum. With the above figures in mind, I find that an appropriate lump sum award is $405,000.

V. Conclusion

[41] In the result, I award CNRL lump sum costs inclusive of GST and disbursements in the total amount of $405,000.

Written submissions provided the 4th and 11th days of October 2024.
Dated at the City of Calgary, Alberta this 31st day of January 2025.

J.C. Price
J.C.K.B.A.

Appearances:

Matti Lemmens/Mr. Maslowski,
Counsel for the Plaintiff, Geophysical Service Incorporated

Craig O. Alcock/Mr. Low,
Counsel for the Defendant, Canadian Natural Resources Limited