Court of King's Bench of Alberta

Citation: Bennett v NE2 Canada Inc, 2025 ABKB 327

Date: 20250528
Docket: 2201 04415
Registry: Calgary

2025 ABKB 327 (CanLII)

Between:

Marc Bennett

Plaintiff

\- and -

NE2 Canada Inc. and Timothy Gunn

Defendants

And Between:

NE2 Canada Inc.

Plaintiff by Counterclaim

\- and -

Marc Bennett, Mandy Burgess, Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert, Christy See and Modern Commodities Inc.

Defendants by Counterclaim

Endorsement
of the
Honourable Justice R.A. Neufeld

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[1] On November 25, 2024 I rendered a decision in respect of applications by a group of oil brokers: ***Bennett v NE2 Canada Inc***, 2024 ABKB 695. They are defendants by counterclaim in an action brought by Mark Bennett against his former employer NE2 Canada Inc and its founder Timothy Gunn (collectively, "the Company").

[2] The principal application before me was to strike from the court record an application for security for costs transcripts of cross-examination of several brokers. The transcripts were considered to include personally embarrassing evidence in response to questions that current counsel viewed as being improper and warranting objection. The security for costs application (and an associated application for a restricted court access order) was abandoned in favor of the strike application.

[3] The strike application was scheduled to be heard in September 2024. Fearing that Mr. Gunn intended to use evidence from the cross-examination transcripts to publicly embarrass one or more of the brokers, an application was brought before Justice Horner of this Court for an injunction prohibiting dissemination of that evidence and sealing of the court record until the strike application was heard. Justice Horner granted a direction for non-dissemination but declined to grant a sealing order due to lack of notice to the media. Shortly thereafter that matter was heard by Justice Carruthers. She denied the sealing order application, holding that it was in substance a request for a restricted access order, and failed to meet the criteria for such an order under ***Sherman Estate***. Both hearings were held in July 2024. The strike application proceeded to hearing on September 6, 2024.

[4] After hearing oral argument, reading detailed written submissions, and reviewing voluminous transcript and affidavit materials, I determined that the strike application lacked merit. I considered the strike application (amounting to a request to "unfile" transcripts) to be unsupported by case law and an end run on the procedures required for a restricted access application. I cautioned the Company against improper use of the cross-examination transcripts and associated affidavit materials. However, I considered it unnecessary to make an order in that respect, and directed that the temporary injunction granted by Justice Horner would not continue.

[5] Following my decision and after unsuccessful negotiations, the Company filed an application for costs. The claim related to the applications heard in the summer of 2024, described (ie the strike application, the injunction application and the sealing application) as well as the abandoned security for costs and restricted court access applications. The Company sought $434,347.42 representing 50% of its solicitor-client costs for 1.5 years of "needless litigation".

[6] The brokers opposed the application. They argued that the costs were grossly excessive; unsupported by detail and did not reflect the fact that they were successful before Justice Horner. They suggested that Column 5 (with a two-times multiplier) would be appropriate. After adjusting for the costs payable to the brokers for the injunction appearance, this would have amounted to approximately $16,000.

[7] I decided that Schedule C costs would not be reasonable in the circumstances, even with a multiplier. I directed that if the Company wished to seek costs as a percentage of fees actually incurred it should provide details of the legal accounts, including services rendered, hours, and rates. It should also break out the fees associated with cross-examination on security for cost affidavits, given the Company's argument the transcripts of same should remain on the court record as they will be useful in future proceedings.

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[8] The parties were directed to have additional discussion regarding costs once additional detail was provided (as has now been done). Those discussions took place and with prejudice offers were exchanged, but no agreement was reached.

[9] The Company offered to settle for $250,000. The brokers offered to settle for $101,000.

[10] The Company now seeks $288,902.25. This represents 50% of its fees in respect of the abandoned applications (after carving out the cost of cross-examination).

[11] The brokers propose $81,000. This is the equivalent of the agreed upon costs received by the brokers for their successful defence of the Company's initial injunction application in December 2023 which sought to prohibit the brokers from working for a competitor. The brokers argue that this is an appropriate comparator in terms of the amount of work required.

[12] Neither party seeks to have the claim reviewed for reasonableness by an assessment officer.

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Disposition

[13] Eligibility and quantum of costs are in the discretion of the Court. Nonetheless, the Court must have due regard for the *Rules of Court* and applicable case precedent.

[14] In this case, I determined that the brokers' primary application was not meritorious. The brokers were partially successful in obtaining temporary injunctive relief pending the strike hearing, but that relief was set aside in the result. The brokers' effort to obtain a restricted court access order pending the strike hearing was also unsuccessful. Accordingly, the Company is entitled to party-and-party costs. The only question is how the costs should be calculated.

[15] As discussed in my Interim Ruling on Costs, Schedule 2 costs would not be appropriate. Both sides are represented by large law firms, with impressive credentials and experience. Legal services provided by such firms does not come cheap. Clients such as the brokers and the Company are aware of that when making strategic and tactical decisions. For the brokers, success at the initial injunction proceeding allowed recovery of 50% of actual fees by agreement and without being limited to the fees available under the *Rules of Court*.

[16] At the same time, I am also not satisfied that an award of costs based on a percentage of legal fees actually incurred is appropriate in these circumstances. A detailed review of legal accounts for the purpose of assessing reasonableness as required by ***Barkwell*** for costs based on a percentage of fees actually incurred would simply trigger another round of argument and attendant costs. In the end, the basic question on the review would be whether the extraordinary fees charged by counsel for the company in defending these applications (approaching $1 million) were necessary and how much of that can fairly be imposed on the unsuccessful party. A line -by-line review by an assessment officer or the Court would assist in that determination but would not provide a definitive answer.

[17] Accordingly, I have decided that the best approach to take is a lump sum award that is not tied to a percentage of fees actually incurred or Schedule 2. In determining the lump sum award, I have taken into account the factors enumerated in Rule 10.33, including complexity of the applications, the manner in which each side has conducted the litigation to date, and the nature of the dispute being litigated (ie reputational harm as opposed to financial losses). I have also considered the history of dealings between the parties regarding costs.

[18] Three other considerations specific to this case are also important in determining reasonableness and quantum.

[19] First, I note that legal costs incurred by the Company in respect of cross-examination on transcripts (approximately $250,000) have been carved out of the claim at my direction. I considered it unfair for the Company to recover costs in respect of those cross-examinations having argued that the transcripts should remain on the court record for use in future proceedings in the litigation. These may be recoverable in the future as costs in the cause but are not properly recoverable now.

[20] Second, I acknowledge and agree with the concerns expressed by the brokers regarding the scope of legal services included in the claim and the number of lawyers involved, including use of regular multi-lawyer intra-office meetings. It is for individual clients and counsel to decide whether that is a cost-effective and value-added approach, but from the perspective of party and party cost recovery it raises a legitimate concern. In my view it is very likely that an assessment officer or the court would reduce the recoverable legal fees after review.

[21] Third, there is a precedent in this case (the initial injunction application) where a somewhat less complex (albeit single) application was argued at significantly less expense, resulting in agreed-upon costs of $81,000 to the brokers (50% of actual fees).

[22] Considering these factors, I have decided that a lump sum award of $150,000 is fair and appropriate. This represents a reasonable compromise between the with prejudice offers exchanged by the parties. It also represents a fair approximation of the costs that would likely have been found reasonable for imposition on the unsuccessful party after detailed review of the BDP accounts.

[23] These shall be paid within 30 days.

Dated at the City of Calgary, Alberta this 28th day of May, 2025.

R.A. Neufeld
J.C.K.B.A.

Appearances:

James D. Murphy, Susan Fader, Karim Ismail and Marcus Memedovich
for NE2 Canada Inc. and Timothy Gunn

Grant N. Stapon, K.C. and Keely Cameron
For the Defendants by Counterclaim/Applicants, Dario Vigna, Jack Widmer, Charles Douglas, Ryan Beckwermert and Christy See

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