Court of King's Bench of Alberta

Citation: Axiom Oil and Gas Inc v Tidewater Midstream and Infrastructure Ltd, 2025 ABKB 64

Date: 20250204
Docket: 2401 05882
Registry: Calgary

Between:

Axiom Oil and Gas Inc.

Plaintiff/Applicant

- and -

Tidewater Midstream and Infrastructure Ltd.

Defendant/Respondent

Ruling on Costs
of the
Honourable Justice K.M. Horner

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[1] This is a costs decision arising from a half-day mandatory injunction application (**Application**) heard on the commercial list September 6, 2024. On September 25, 2024, I gave oral reasons dismissing the Application.

[2] Counsel requested an opportunity to file briefs in support of their positions on costs. Specifically, counsel wanted an opportunity to speak to the effect of a *Calderbank* offer the respondent, Tidewater, served on the applicant, Axiom, on July 11, 2024.

[3] Tidewater seeks full indemnity for the solicitor and client costs incurred in opposing the Application. In the alternative, relying on ***McAllister v Calgary (City)***, 2021 ABCA 25 [***McAllister***], Tidewater seeks 40-50% of its solicitor and client costs to the date of the *Calderbank* offer, and double that for costs incurred thereafter.

I. BACKGROUND

[4] The parties are counter parties to a series of agreements related to oil and gas assets in the Brazeau River region of Alberta, including an Asset Purchase Agreement (**APA**) and a Gas

Handling Agreement (**GHA**). Under these agreements, Tidewater agreed to exclusively process Axiom's sour gas from the wells Axiom had purchased from Tidewater under the APA. Pursuant to the terms of the GHA, as interpreted by Tidewater, it terminated the agreement and ceased processing sour gas from the wells in the spring of 2024.

[5] The Application for a mandatory injunction was booked for a half-day, and the parties filed voluminous material consisting of three binders of materials including all pleadings, two affidavits from Axiom, one affidavit from Tidewater, questioning transcripts on each affidavit, and undertaking responses. Each counsel also filed a brief, a book of authorities, and additional case law and replacement exhibits were received before the hearing.

[6] Tidewater's evidence is that continuing to process the sour gas from Axiom would require a $10 million investment to refresh the processing facility. The refresh would result in Tidewater processing the sour gas at a multi-million-dollar loss. Axiom's position is that Tidewater terminated the GHA in bad faith, and that given there were no alternative processing options, Axiom would incur millions of dollars in shut-in costs and lost revenue from the remaining gas reserves. I found that the Application was not supported on the evidence and dismissed it.

[7] The Court received the written submissions of Tidewater on October 11th, along with supplemental written submissions on November 15th, 2024. The Court further received written reply from Axiom on October 18th, and November 22, 2024.

[8] Tidewater's submissions value their solicitor and client fees in opposing the Application at approximately $325,250, plus disbursements and other charges including GST, for a total of approximately $347,000. Axiom submits that the circumstances here do not warrant an extraordinary award of full indemnity or solicitor and his own client costs, and that the quantum claimed is excessive and not reasonable and proper as required by the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*].

[9] As noted, Tidewater filed what is commonly known as a *Calderbank* offer on July 11, 2024, proposing Tidewater pay Axiom the all-inclusive amount of $25,000 in exchange for Axiom not seeking further injunctive relief in the action.

[10] As a preliminary note, there has been no assessment of the claimed costs by a review officer.

II. ISSUES

[11] The issues arising from the submissions are:

a) Whether the solicitor client costs incurred by Tidewater are reasonable and proper as required by rule 10.31(1)(a) having regard to the considerations outlined in rules 10.2(1) and 10.33;

b) In the alternative, whether a ***McAllister*** percentage award in the amount of 40-50% is more appropriate; and

c) Whether the July 11,2024 letter is a valid *Calderbank* offer, and if it is, whether double costs should be awarded for the costs incurred following the offer.

III. LAW

[12] Costs follow the cause. In granting costs, the Court has broad discretion: *Rules*, r 10.29-10.31. There are four main types of costs awarded by the Court, albeit not always referred to in the same way:

1. Party and party costs – assessed using the tariff in Schedule C of the *Rules*. Typically, the successful party will receive a portion of their legal fees. The Court can award a multiple, proportion or fraction of the amounts in the tariff: *Rules*, r 10.31(3);
2. Lump sum costs – as permitted by rule 10.31(1)(b)(ii);
3. Solicitor-client costs – full indemnity for all legal fees and disbursements 'reasonably' incurred by the party to whom they are awarded under rule 10.31(1)(b)(i); and
4. Solicitor and own client costs – allow a lawyer to charge the client for "frills or extras" a client would reasonably be expected to pay but should not be passed on to third parties except in exceptional circumstances. This is empowered by rule 10.31(1)(b). These costs go beyond the reasonable fees and disbursements incurred for all steps reasonably necessary within the four corners of the litigation.

Secure 2013 Group Inc V Tiger Calcium Services Inc, 2018 ABCA 110 at para 12 [***Tiger Calcium***].

[13] In this matter, Tidewater claims solicitor-client costs in full. In the alternative, Tidewater seeks a percentage of their solicitor-client costs, with the percentage being doubled for the costs incurred after the *Calderbank* offer of July 11, 2024, was made. Inferentially, Tidewater submits that there are no frills or extras, and that the full fees incurred by its client are reasonable and proper.

[14] Rule 10.2(1) outlines the considerations for determining reasonable payment for a lawyer's services. This includes an assessment of both the legal services provided and the amount charged for those services. Relevant considerations to the cost dispute at hand under rule 10.2(1) include:

> (a) the nature, importance and urgency of the matter,
>
> ...
>
> (d) the manner in which the services are performed,
>
> (e) the skill, work and responsibility involved, and
>
> (f) any other factor that is appropriate to consider in the circumstances.

[15] Rule 10.33 outlines considerations for determining a reasonable quantum for a costs award. When making a costs award, the Court can consider any settlement offers made, the conduct of a party that tended to shorten or lengthen the proceedings, and whether a party engaged in misconduct: *Rules*, r 10.33(2). Rule 10.33 (1) further details several other considerations relevant to the assessment of costs in this matter including:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

...

(d) the complexity of the action;

...

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[16] When determining an appropriate costs award, the Court must further consider whether the fees charged by the lawyer are reasonable using the enumerated factors in rule 10.2(1): ***Tiger Calcium*** at para 47. Additionally, the Court must consider the appropriateness of the hourly rates being charged, the experience and seniority of the lawyers who completed the work, the proportionality between the fees charged and the experience and seniority of counsel, the number of counsel involved, the proportionality of the steps taken to the goal sought, and whether the overall fees claimed are proportionate to the issues: ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 at para 57, leave to appeal to SCC refused 2023 CanLII 122411; ***VLM v Dominey Estate***, 2023 ABCA 382 at para 13; ***Barkwell v McDonald***, 2023 ABCA 87 at para 60.

IV. ANALYSIS

A. Reasonable and Proper Costs

[17] Tidewater submits that its fees, disbursements and GST in the approximate amount of $347,000 are reasonable and proper under the circumstances.

[18] Tidewater supports their position by highlighting that they were completely successful in defending the Application. Tidewater further asserts that although the Application was framed as interlocutory, the effect of the decision is final.

[19] The Application was of high importance to both parties given the risk of potential damages to either side was very high. However, given the nature of mandatory injunctions, the Application was of higher relative importance to Tidewater. Had Axiom been successful, Tidewater would have had to incur significant costs to be able to continue processing Axiom's sour gas. Meanwhile, Axiom would still have the benefit of their reserves. As a result, it was incumbent on Tidewater to do everything it could to ensure success on the Application. The nature, importance, urgency, complexity and money at stake were all at the top end of the range.

[20] Tidewater asserts that Axiom is guilty of taking disproportionate and excessive steps, pointing to Axiom’s completion of a full day examination of its affiant, and requesting numerous undertakings basically nitpicking Tidewater's economic evidence while providing none of its own. Despite the relative speed of the approaching Application, Tidewater nonetheless provided its undertaking responses in five days. Considering the importance and volume of Tidewater's evidence, a full day examination was warranted in the circumstances.

1. The effect of the *Calderbank* offer

[21] Axiom did not accept the *Calderbank* offer yet the result of the Application was as the offer predicted – no injunction was granted. While the validity of the *Calderbank* offer will be discussed later, the Court may still consider the evidence of any resolution efforts in its consideration of the costs award: *Rules*, r 10.33(2)(h).

[22] Certainly, both parties expended significant fees after the *Calderbank* offer was made on July 11, 2024, including the filing of Tidewater's affidavit comprised of nearly 1000 pages, the cross examination of both party's affiants and the resultant preparation of undertaking responses, and the preparation of briefs and books of authorities for the Application. On the other hand, with the losses that Axiom asserted it faces, the settlement amount could not have been considered in any way persuasive. At best, this is a neutral factor in considering whether the quantum of Tidewater's costs are reasonable and proper.

2. Fees and disbursements

[23] Turning to the fees and disbursements, counsel for Tidewater attached a full breakdown of each billable time entry spent by counsel, together with a full breakdown of the disbursements and other charges totalling approximately $4,800. The billing rate of the partners, the associates, and the students was not provided.

[24] As noted in Tidewater’s brief, the fees charged are made up of six different billing counsel, 19% by two partners, 34% by 2 different associates, and 47% by two students with one becoming an associate during the time fees were billed to the matter. Without the benefit of the billing rate for each counsel it is difficult to determine whether the fees are proportionate, reasonable and proper. Certainly, it can be said that variable rates were involved, and most of the work was presumably not billed at a senior partner rate. Nonetheless, the exact hourly rates charged remain unknown.

[25] Tidewater further breaks down its fees into tasks or steps that were required to oppose the Application. The fees for preparing its supporting affidavit totaled just over $100,000, or almost 30% of the overall fees billed. Tidewater justifies this by emphasizing that the affidavit was pivotal to its position, covered many areas, and detailed relevant evidence, some of which was mentioned in the reasons for my decision.

[26] Axiom points out that the hours spent by five different counsel totalled 135.8 hours. Axiom suggests that half this amount, or 68 hours, should be considered reasonable. I agree that 135.8 hours is excessive even when considering the alleged damages at stake and that the affidavit was pivotal and fulsome. By having so many counsel involved, there was bound to be overlap in their work and Tidewater provided no further light as to why so many counsel were required to oppose the Application.

[27] Tidewater goes on to submit that approximately $60,000 in fees was charged for the preparation of their affiant, preparation for cross-examining Axiom's affiant, attendance at both cross-examinations, and preparation of their affiant's undertaking responses. Axiom asserts that this is excessive, pointing out that the hours Tidewater spent in preparation and attendance at cross-examination for the affiants totalled 129.45, the vast majority of which was preparation, and that three Tidewater counsel attended the cross examination despite only one partner conducting the cross-examination. The cross-examination of Axiom’s affiant only lasted two hours. Further, when

Tidewater's affiant was cross-examined, again three Tidewater counsel attended. I find that the number of hours and counsel involved was excessive.

[28] Tidewater further submits that their fees for their brief totaled approximately $110,000. In completing the brief, Tidewater states that counsel conducted an extensive review of the APA and GHA, a detailed examination of the case law—some of which was complex, and lengthy attendances with Tidewater representatives to understand the economic modelling at the core of the affiant's evidence. One would have thought a significant amount of the economic modelling would have been considered and understood in the preparation of the affidavit and that one would only require some refreshing when creating the brief. Axiom takes the position that 231.9 hours and six different counsel to prepare the brief is simply not justified since research was previously and separately accounted for in the breakdown of their fees. I too find the number of counsel and hours spent to produce a 30-page brief excessive.

[29] Tidewater submits that it required $35,000 in counsel time to prepare and attend the Application, which was a little over three-hours of court time, and to attend for the oral reasons later provided by the Court which was little more than one-hour. Tidewater submits the fees are reasonable and proper as the preparation required was extensive and covered a review of all the evidence and pleadings together with the case law. Axiom submits that billing 46.8 hours to prepare, and for three counsel to attend both hearings was excessive. I am of the view that only two counsel were required at the hearing, and only one counsel should have attended the decision hearing.

[30] Tidewater submits that it stood ready to speak to costs at the later hearing, but that Axiom requested time for written submissions. Given the scope of the written briefs and that four were required before adequate information and submissions were made, this is not a sustainable position. Axiom takes the position that 33.2 hours from four different lawyers to prepare Tidewater's first brief on costs is excessive and premature in that the costs award outcome was then unknown.

[31] I again agree that the hearing charges are excessive and therefore not reasonable and proper and again a reduction will be required. An award for the costs briefs will be considered at the end of this decision.

[32] Overall, the total number of hours spent by Tidewater counsel to review the Application, prepare evidence, attend cross examinations (2), provide answers to undertakings, prepare their written submissions, provide oral submissions, and attend for the oral decision with one brief on costs was 635.9 hours. Axiom suggests that only a total of approximately 210 hours be allowed excluding the 33.2 hours billed for the first Tidewater costs brief, or roughly 30% of the fees charged by Tidewater.

[33] Tidewater submits that an increased costs award in its favour is called for in this matter as Axiom asserted in its affiant's evidence and in its written and oral submissions, that Tidewater was acting in bad faith in commissioning and assisting in preparing its economic analysis and when it later exercised its alleged contractual right to terminate the GHA in reliance on its economic modelling. Tidewater submits that this bad faith allegation harmed its reputation in a somewhat small industry, that of the midstream segment of the oil and gas industry, where their reputation with upstream producers is vital for attracting and retaining business. Tidewater submits that as an upstream producer itself, Axiom is aware of how vital the reputation of a midstream player can be. Further, Axiom offered no real evidence of bad faith and despite sound economic modelling being

produced and shared with Axiom, it refused to retract the allegation. Tidewater suggests enhanced costs, even full solicitor client costs for this reputational damage is in order.

[34] Tidewater offers no evidence of reputational damage. Although evidence of reputational damage is not always required for an enhanced award of costs, this is typically only permitted for egregious and repeated allegations of bad faith, which is not the case here. Further, the Application was quickly dealt with in Tidewater's favour and that likely would have mitigated any loss of reputation that had perhaps occurred. Additionally, as Axiom points out, this was an interlocutory Application no matter the final nature of its impact. The final word on whether Tidewater did conduct itself in bad faith is yet to be decided. I consider this a neutral factor currently, and not one upon which an enhanced costs award is warranted.

[35] After considering all the submissions above, including what amount would be reasonable for Axiom to be asked to pay, and the importance of the Application to both parties I find that Tidewater's requested relief of $325,000 is not reasonable and proper in the circumstances.

B. A *McAllister* Award is More Appropriate in the Circumstances

[36] ***McAllister*** states that 40-50% is the typical level of indemnity provided by the Court in situations where no misconduct has been found: ***McAllister*** at para 50. However, the Court nonetheless retains the discretion to vary this amount where justified: ***McAllister*** at para 51.

[37] Briefly put, after consideration of the ***McAllister*** reasoning and the subsequent Court of Appeal decision on costs in ***Barkwell***, I am satisfied that a percentage award outside the 40-50% range is not warranted here.

[38] I therefore direct that pursuant to rules 10.31(1)(a) and 10.31(3)(d) that reasonable and proper costs be awarded to Tidewater totalling 50% of the fees billed. The time charged for the first written costs brief, or 33.2 hours is not to be included in this costs award, leaving roughly 600 compensable hours at a 50% rate. I find that Tidewater's blended hourly rate derived from dividing the fees claimed by Tidewater of $325,000 by the hours claimed of 635.9, results in an approximate average hourly rate of $511 per hour. Applying this hourly rate to the 600 compensable hours, at a 50% recovery, I find a costs award in Tidewater's favour of $153,300 plus reasonable disbursements, other charges and GST to be paid forthwith by Axiom to Tidewater.

C. *Calderbank* Offer

[39] On July 11, 2024, Tidewater made a *Calderbank* offer to Axiom for the total payment inclusive of costs of $25,000 whereby Axiom was to withdraw its Application and agree to not bring another for similar relief in the same action. The offer was open for 15 days. *Calderbank* offers are informal offers that do not automatically attract a doubling of costs for steps taken thereafter. However, the Court has wide discretion over costs, including the effect of any efforts at resolution.

[40] The considerations the Court must take into account when considering a cost award after an informal offer is made are laid out in the Court of Appeal decision of ***Bruen v University of Calgary***, 2019 ABCA 275 as relied on in ***Kent v MacDonald***, 2020 ABQB 29 [***Kent***]. They are:

a) the offer was a reasonable, genuine compromise;

b) it gave a cost advantage if accepted;

c) adequate time to consider the offer was provided;

d) the offer was unreasonably rejected;

e) the party making the offer fared batter than if the offer was accepted.

Kent at para 16.

[41] On the facts before me and given the allegations of damage in the millions of dollars to either side, I must consider whether $25,000 dollars was a genuine offer, or a mechanism utilized to trigger an enhanced award. I am mindful that Tidewater has a sound argument in favour of a contractual damage cap of $200,000. However, that would not have assisted with its out-of-pocket costs in the event the Application had been granted.

[42] Clearly factors b), c) and e) are present here. However, given the significance of the issues in the Application and the alleged impact on both parties with respect to its outcome, I do not find that the *Calderbank* offer was a genuine offer of compromise or that it was unreasonable rejected. Therefore, I do not direct that enhanced costs after July 11, 2024, be levied.

V. COSTS OF THIS APPLICATION

[43] As previously mentioned, Tidewater seeks its reasonable and proper costs for preparation of its two written briefs on costs, including the hours spent on its first costs brief. I agree that the request was premature as the costs award with respect to the Application had not yet been decided. As this decision has been a mixed result with neither party having achieved their requested costs award, I direct that each party bear its own costs with respect to the costs portion of the Application.

Dated at the City of Calgary, Alberta this 4th day of February, 2025.

K.M. Horner
J.C.K.B.A.

Appearances:

Warren Foley and Kevin Pedersen
for the Plaintiff/Applicant, Axiom Oil and Gas Inc.

Michael P. Theroux K.C., Laura Gill and George Bocock
for the Defendant/Respondent Tidewater Midstream and Infrastructure Ltd.