Court of King's Bench of Alberta

Citation: North American Polypropylene ULC v Williams Canada Propylene ULC, 2024 ABKB 152

Date: 20240318
Docket: 1601 10614
Registry: Calgary

Between:

North American Polypropylene ULC

Plaintiff

- and -

Williams Canada Propylene ULC, Williams Energy Canada ULC, the Williams Companies Inc. and Inter Pipeline Ltd.

Defendants

Costs Decision of the Honourable Justice R.A. Neufeld

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[1] In November 2023, I issued Reasons for Decision in respect of an action by North American Polypropylene ULC against Williams Canada Propylene Williams Energy Canada ULC, the William Companies Inc and Inter Pipeline Ltd: ***North American Polypropylene ULC v Williams Canada Propylene ULC***, 2023 ABKB 673. I dismissed the action with costs and directed that if the parties could not agree on the quantum of costs, they could return that issue to me for determination based on written submissions.

[2] They did not agree on the question of costs and filed submissions setting out their respective positions.

[3] The Defendants seek substantial costs, taking into account the amounts claimed at trial (nearly $1 Billion CAD), the complexity and duration of the action (seven years of pre-trial litigation culminating in a five-week trial), and the refusal of a pre-trial offer of settlement ($1 million plus waiver of costs).

[4] The Defendants seek 50% of their actual legal fees of $7,766,237 plus 100% of recoverable disbursements of $1,707,054, for a total of $5,928,398.

[5] Alternatively, they seek $4,339,722 based on Column 5 of Schedule C (with a multiple of 5 times and adjusted by 1.2% for inflation) for legal fees, and 100% of their recoverable disbursements.

[6] The Plaintiff argues that costs should be determined based on Column 5 of Schedule C with a multiplier of 3. It opposes any award based on actual legal fees, on the basis that the evidence before the court (redacted invoices) is insufficient to allow a proper review for reasonableness. It says that even without such details it is clear that too much legal time was spent on a straightforward breach of contract action. The Plaintiff also challenges the reasonableness of expert and certain lay witness fees claimed by the Defendants and opposes inclusion of costs for certain applications in which the Plaintiff was successful.

[7] The Plaintiff argues that a reasonable award of costs would be $1,707,054. This is comprised of legal fees of $868,299 and disbursements of $860,000. The legal fees number reflects deductions for certain applications. The disbursements number reflects recovery of 50% of the Defendant's expert fees, and deduction of certain costs claimed for attendance of Williams Canada and Williams Inc executives at trial.

[8] Entitlement to costs is not in issue. To decide this application, I must determine the appropriate method for establishing the quantum of costs. Based on that method, an amount can be set at this time, or after further review by a Review Officer.

[9] I have decided that the legal fees component of costs should be set as a percentage of those which are determined to be reasonable and proper as assessed by a Review Officer. To guide that assessment, I will set the proportion of assessed legal fees to be recovered and will provide comments regarding the factors set out in Rule 10.33. I will also provide directions regarding the experts' fees, pre-trial and post-trial applications, the late filing of supplemental evidence by the Plaintiff, and the significance (if any) of an offer to settle made by the Defendants a few days before trial.

General Principles

[10] In ***McAllister v Calgary (City),*** 2021 ABCA 25, our Court of Appeal summarized the governing principles that apply when an award of party and party costs is considered. These principles guide a trial judge in exercising their discretion to award costs under the *Rules of Court*. First, a successful party at trial is ordinarily entitled to recover costs. Second, while the award of costs is discretionary, the court must be guided by the factors enumerated in Rule 10.33 when determining the amount of a costs award. Third, the court may then employ a variety of tools or approaches in determining how to arrive at an award of reasonable and proper costs. The "menu" of options are set out in Rule 10.31, and include use of Schedule C (with or without multipliers) and a lump sum award of a portion of assessed costs.

[11] Prior to ***McAllister***, trial Courts routinely set the legal fees component of party and party costs at 40-50% of actual legal costs.

[12] In ***Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH***, 2019 ABCA 92, for example, the Court of Appeal expressly endorsed that approach, saying: "The general rule is that costs are awarded on a party and party basis, and that this should represent partial indemnification of the successful party - approximately 40-50% of actual costs": para 11.

[13] In ***McAllister***, the Court of Appeal reinforced this general rule, but in doing so also noted that if the court uses the option of awarding a percentage of assessed costs, the legal fees component of the award may need to be evaluated having regard to the factors set out in Rule 10.2. This is necessary to ensure that the fees were "reasonable and proper." That evaluation can be done by the party opposite, the trial judge, or a Review Officer. It includes the reasonableness of both the legal services performed and the amounts charged for those services: para 46.

[14] The Rule 10.2 factors to be considered in assessing the reasonableness of a lawyer's fees as between solicitor and client are as follows:

> (1) Except to the extent that a retainer agreement otherwise provides, a lawyer is entitled to be paid a reasonable amount for the services the lawyer performs for a client considering
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> (a) the nature, importance, and urgency of the matter,
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> (b) the client's circumstances,
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> (c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,
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> (d) the manner in which the services are performed,
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> (e) the skill, work and responsibility involved, and
>
> (f) any other factor that is appropriate to consider in the circumstances.

[15] The court in ***McAllister*** went on to note that determining reasonableness as between solicitor and client is not the end of the matter when the analysis is in the context of determining party and party costs. In that case, consideration must also be given to the reasonableness of the unsuccessful party being required to indemnify the successful party for a percentage of them: para 48.

[16] In ***Barkwell v McDonald***, 2023 ABCA 87, the Court of Appeal clarified further that although the legal fees component of a costs award may be based on a percentage of legal fees, the actual fee charged cannot be accepted at face value as the amount that was reasonably and properly incurred. To determine that amount, there must be a detailed analysis by the trial judge or Review Officer under Rules 10.2 and 10.33. It is not open for the trial judge to simply grant a costs award equal to a percentage of the actual legal fees incurred by the successful party without further analysis, and without a draft Bill of Costs based on Schedule C (to be used for benchmarking purposes).

Positions of the Parties

[17] The Defendants seek partial indemnification for their legal costs (as actually incurred) and their disbursements. They cite a variety of factors to justify an award of 50% of their actual legal fees, including:

- The complexity of the action,
- The extraordinary damages sought,
- The dismissal of the action,
- The rejection of a pre-trial settlement offer (days before trial) of $1 million, plus a waiver of costs,
- The filing of late evidence shortly before trial to shore up gaps in Plaintiff's claim for stranded project development costs,
- The Plaintiff's prolongation of the trial by refusing to accept agreed upon records of communications as truth of their contents, and
- The decision by the Plaintiffs to split their case between Alberta and Texas, causing unnecessary duplication of financial and judicial resources.

[18] They also argue that the costs incurred for experts (Dr. Atherton and Mr. Adams) were reasonable and proper when incurred and proportionate to the importance of the issues in the litigation and the damages sought at trial.

[19] In the alternative, the Defendants seek costs based on Column 5 of Schedule C, with a multiplier of 5, and an inflation adjustment of 1.2%, for a total legal fee recovery of $4,339,722. A draft Bill of Costs accompanies their application.

[20] The Plaintiff argues that the Defendants have not provided sufficient, unredacted accounts or other evidence to allow a proper review of the reasonableness of their legal fees. They deny any improper conduct at trial, noting that the trial was in fact a model of how a commercial action can be efficiently litigated by experienced and cooperative counsel.

[21] The Plaintiff contends that even without disclosure of unredacted legal accounts, it is apparent that the Defendants incurred excessive legal fees. For example, during the five-week trial the Defendants regularly had four or five lawyers in attendance, compared to two or three for the Plaintiff. When the CEO of the Williams Inc. group of companies came to Calgary to testify, the Defendants had 7 lawyers and one student-at-law in attendance.

[22] The Plaintiff also opposes some specific cost items, including costs relating to:

- the Defendants' unsuccessful post-trial anti-suit injunction application,
- the Defendants' unsuccessful application for security for costs, and
- a consent order waiving mediation that was granted without costs.

[23] The Plaintiff also opposes various disbursements claimed. These include:

- $50,000 in compensation to Williams Inc's CEO, Alan Armstrong, for preparation and attendance at trial (having been requested to appear by the Plaintiff) including $14,200 for a private jet.

- $73,783 in compensation to David Chappell (CEO of Williams Canada Propylene) for preparation and attendance at trial.

[24] The Plaintiff contends that the fees for expert witness Jacob Adams of Alvarez and Marsal Disputes and Investigations LLC were excessive and unsupported in detail. Mr. Adams' firm charged $520,000 for his reports and attendance at trial. The Plaintiff argues that this component should be reduced by 50%, as was done in ***Remington Development Corporation v Canadian Pacific Railway Company,*** 2023 ABKB 591, at para 90.

[25] A reduction of 50% is also sought by the Plaintiff in respect of Dr. Atherton's fees for two expert reports, and trial attendance (billed at $1,090,000). The Plaintiff asserts that Dr. Atherton did not provide unbiased evidence, and his primary report was replete with hearsay and argument.

[26] These adjustments, if agreed to by the court, would reduce the recoverable disbursements to $860,995.35.

Assessment

[27] Determining the quantum of costs recoverable after trial is fundamentally an exercise of discretion. The legal fees component of party and party costs, whether determined with reference to Schedule C or otherwise, will engage that discretion in two ways. First, in deciding whether the magnitude and/or complexity of the claim warrants use of a multiplier under Schedule C, and what that multiplier should be. Second, in determining the percentage of legal fees to be paid by the unsuccessful party in those cases where Schedule C is not directly applied. Applying ***Barkwell,*** those fees are not necessarily comprised of the successful party's actual legal fee, but only the fees that were reasonably and properly incurred, having regard to the factors enumerated in Rule 10.33. ***Barkwell*** also instructs that regardless of the method used, a draft Bill of Costs per Schedule C should be provided as to inform the analysis: para 58.

[28] In my view, a useful post-trial starting point in the discretionary process, irrespective of the tool used to determine reasonable and proper costs, is to consider the relevant factors enumerated in Rule 10.33, given the circumstances of the case. I will discuss each in turn.

a) Result of the action and the degree of success of each party

[29] The Plaintiff's claim was dismissed, with costs.

b) The amount claimed and the amount recovered

[30] The Plaintiff sought damages of approximately $700 million (USD). This was comprised of approximately $35 million to $42 million (USD) for damages determinable under the contract (stranded pre-construction costs), and $660 million (USD) in loss of opportunity damages for breach of contract, unjust enrichment, and misuse of confidential information. The focus of evidence and argument at trial was the claim for recovery of stranded pre-construction costs.

c) Importance of issues

[31] While recovery of stranded pre-construction costs was the focus of the claim, the overall magnitude of the claims advanced made the issues at trial important to both parties.

d) The complexity of the action

[32] The Plaintiff argues that while a substantial claim for damages was made, the issues raised were not particularly complex. It says that "Basically, it was a breach of contract case."

[33] I agree that the essential issue before the court was straightforward. That is, whether the Plaintiff's pre-construction costs were stranded due to a failure by the Defendants to cooperate in the Plaintiff's efforts to secure financing, therefore making them recoverable under the contract.

[34] However, the claim before the court went much further than that. It included a claim for loss of opportunity damages that dwarfed the straightforward claim for recovery of stranded pre-construction costs, and brought additional defendants into the action, even though they were not parties to the contract.

[35] Defending the claim was also complicated by the decision of the Plaintiff and its beneficial owners to simultaneously pursue a similar action in Texas, in which Williams Canada affiliates and two of their executives were sued (in their personal capacity) for fraudulent pre-contractual misrepresentation. That claim was also for several hundred million dollars. As a result, Canadian counsel for both parties undoubtedly needed to engage and coordinate their activities with their U.S. counterparts to ensure consistency of strategy, positions, and preparation of lay and expert witnesses.

[36] As would be expected for a claim of this magnitude, and following seven years of pre-trial activity, the oral and documentary evidence tendered at trial was extensive. The hard copies of exhibits (primarily email correspondence, slide decks and agreements) and read-ins from questioning occupy ten feet of shelf space. There were approximately 1,500 pages of transcripts, and thousands of pages of briefs, reply briefs and case authorities.

[37] While the essential issue to be determined at trial was straightforward, the trial and pre-trial processes were not. At trial, counsel on both sides were courteous, professional, and cooperative. This allowed the trial to be completed as scheduled, but not without exceptionally hard work by all involved.

e) The conduct of a party that tendered to shorten the action

[38] I agree with the Plaintiff that counsel cooperated with each other to efficiently try this case. That cooperation was appreciated by the court.

[39] I am nonetheless concerned that the decision by the Plaintiff and its beneficial owners to pursue claims in Alberta and Texas based on substantially the same facts created unnecessary duplication and wasted financial and judicial resources on both sides of the border. On the other hand, Williams Canada has only itself to blame for its delay in applying for an anti-suit injunction that would, if successful, have required NAPP to pursue its claim in Alberta only. By the time that application was made, it was too late for the Plaintiff to amend its claim to include the claim of fraudulent precontractual misrepresentation, as its case had been closed: ***North American Polypropylene ULC v Williams Canada Propylene ULC***, 2023 ABKB 276 at para 36.

[40] In the circumstances, the duplication of claims between Alberta and Texas did not in itself warrant enhancement of costs. It did however complicate the defence of the Canadian action and increased the costs of doing so. It also continues to complicate disclosure of detailed descriptions of legal services in the accounts of the Defendants' counsel.

How Should Costs be Determined?

[41] Sophisticated, well-funded litigants expect to expend substantial resources when engaging in high stakes litigation before the Courts or arbitrators. They are quite capable of factoring the costs of doing so into their assessment of litigation risks and rewards as the process unfolds. They are also quite capable of monitoring the cost of outside counsel and the value of advice and advocacy being provided.

[42] In deciding how to determine costs in such cases, the court should be careful not to conflate the need to ensure access to justice as it applies to routine litigation and ordinary litigants, with the needs of industry in commercial dispute resolution by the courts. What industry requires is judicial dispute resolution that is as responsive, effective, and efficient as that offered by extra-judicial sources. Although bound by the *Rules of Court* and precedent when exercising its discretion over costs, the Court should endeavor to respond to those needs. This includes awarding meaningful costs to successful parties, commensurate with the value of the claims being litigated.

[43] Schedule C was clearly not designed with complex commercial litigation in mind. This is evidenced by the need to pick a multiplier of column 5 to approximate what the trial judge considers to be reasonable and proper legal costs that should be borne by the unsuccessful party. When the amount at stake is many times that specified in column 5 ($2 million) the use of multipliers tends to become increasingly subjective and lacking in realism. In ***Trizec Equities Ltd v Ellis-Don Ltd***, Mason J described the surrealism of this approach as follows:

> It makes infinitely more sense to simply determine what percentage of indemnity is appropriate and make the award on a percentage basis, than it does to determine the appropriate level of costs and then invent a formula, using a multiplier to arrive at that level of recovery. Put another way, determining a level of recovery and then working backwards to find an equation which supports it is an exercise in fiction which, as the Schedule Committee pointed out, is of little precedential value to either the courts or future litigants.

[44] Schedule C also omits many of the services that are so important to litigating complex commercial disputes. These include advanced document management, coordinated strategic planning, the careful selection, instruction, and preparation of expert witnesses, and extensive preparation required for questioning and trial. As noted by Justice Dilts of this Court in ***Intact Insurance Company v Clauson Cold & Cooler Ltd***, 2019 ABQB 225, the further that Schedule C strays from the real and reasonable legal costs paid, the less likely it is that the risk of paying Schedule C costs will promote settlement or beneficially affect the conduct of litigants: para 15.

[45] In ***Remington***, Justice Woolley (as she then was) discussed the law of costs, and concluded as follows regarding the use of Schedule C following a complex commercial trial:

> I am satisfied that it would not be proper to calculate Remington's costs entitlement based on Schedule C. The length and complexity of the trial, the $165,166,431 in damages awarded to Remington, and the intensive legal resources employed by all parties, render this trial too far from the "ordinary case" for Schedule C to provide appropriate guidance as to what would be a fair and proportionate costs award.

[46] Later in her reasons, after deciding that an award of 50% of assessed legal fees was justified, Justice Woolley commented that: “The Schedule C fees in Remington’s Bill of Costs are only $388,335; however, when considering that the judgment is over 80 times the $2,000,000 referenced in Column 5 of Schedule C, and the criteria in Rules 10.2 and 10.33, that benchmark is of limited relevance”: para 64.

[47] I agree with those observations and find that Schedule C is not an appropriate tool in this case, either.

[48] The primary alternative to Schedule C is to set costs based on a percentage of legal fees, plus disbursements.

[49] Under ***McAllister*** and ***Barkwell***, the trial judge or the Review Officer must first assess the reasonableness of the fees claimed, having regard to the factors set out in Rule 10.2 and Rule 10.33. The objective of the review is to determine two questions: whether the amount claimed was reasonable in the first instance, and whether it is reasonable for the unsuccessful party to be required to pay that amount for those services by way of party and party costs. In keeping with the partial indemnity principle and the case authority, the reasonable and proper costs as determined through that process are then discounted, usually by 40-50%.

[50] For complex commercial cases the assessment process can be a formidable task, given the sheer volume of material and other materials to be reviewed. It may also be hampered by the redactions required to maintain confidentiality and privilege over the issues and risks identified by counsel, and associated strategies. This is particularly so where there is ongoing litigation (as is the case here).

[51] Despite those drawbacks, the award resulting from the percentage model has a much better chance of reflecting the amount of fees that were reasonably and properly incurred, and that which the unsuccessful party can fairly be required to pay, than Schedule C. I will therefore use the assessed costs approach to determine the legal fees that were fairly and reasonably incurred.

[52] Those fees will be determined by a Review Officer, based on the application materials, any supplementary information that the Review Officer may in their discretion require, the directions contained in these Reasons, and the factors set out in Rule 10.2.

[53] In conducting that review the Review Officer may consider it necessary to obtain additional information regarding the legal services provided by counsel for the Defendants. They may decide that it is necessary for unredacted invoices or other evidence, with respect to the roles played by different timekeepers in pre-trial preparation of trial the trial itself, to be provided. The Review Officer may also determine whether there are steps that can be taken to facilitate production of that information while also protecting against disclosure of privileged information pending completion of the Plaintiff’s appeal of the Alberta trial decision, and the companion litigation in Texas.

[54] I will leave these issues for the Review Officer to determine, with input as appropriate from the parties. If necessary, however, a reference can be made to me for a decision or direction pursuant to Rule 10.39.

[55] I set the proportion of assessed legal fees to be paid by the Plaintiff at 45%. This is at the midpoint of the traditional range of 40-50%.

[56] As mentioned earlier, counsel on both sides of this trial were courteous and professional. They also cooperated in reducing the amount of time required for the trial. The magnitude of the claim is already reflected in the choice of indemnity costs, and in the quantum of costs that I expect to result from the review. Accordingly, I do not consider the top end of the range to be appropriate.

[57] On the other hand, while tendered far too late in the process to be given substantial weight, the Defendants did offer to settle the case a few days before trial for $1million (with each party to bear their own costs). They were also required to deal with a very late filing of evidence by the Plaintiffs that filled in certain gaps in the proof of pre-construction expenses that had been noted by the Defendants' expert. That evidence was allowed into the record, but the lateness must have cost consequences of some form. Accordingly, I do not consider that the bottom end of the range is appropriate, either.

[58] The Review Officer's review will not extend to a review of experts' fees as these are dealt with in this decision, based on my observations at trial. The Review Officer's review will include consideration of the costs associated with interlocutory applications in which the Plaintiff was successful, and determination of reasonable and proper witness appearance fees and costs.

Experts' Fees

a) Dr. Atherton

[59] Dr. Atherton authored a report that assessed the bankability of the Plaintiff's proposed polypropylene project. He also authored a rebuttal report responding to an expert report on the subject, authored by Plaintiff's financing expert Mr. Michael Whalen. The primary report reviewed, in detail, the record of communications between the Plaintiff, its financing advisor, and potential equity finance investors. It then constructed a narrative of sorts describing the financing obstacles faced by the Plaintiff, and opining on whether in the circumstances it would have achieved Financial Close on or before the date specified in the contract.

[60] The Plaintiff submits that the argumentative nature of the Atherton report warrants reduced recovery (50%).

[61] There is some merit to that position, as the style employed by Dr. Atherton reduced the utility of his primary report. However, I found Dr. Atherton's primary report helpful in assessing the bankability issue in general. His collection of contemporaneous communications was also useful, notwithstanding the need to cross-check those communications against the trial record. Dr. Atherton's rebuttal report was very helpful, particularly in its comparison of Mr. Whelan's assessment of how lenders would theoretically have considered the financing of NAPP's project with the contemporaneous project records in which the debt and equity financing challenges faced by NAPP were discussed, both internally and externally.

[62] Accordingly, I allow recovery of 75% of Dr. Atherton's accounts.

b) Mr. Adams

[63] Mr. Adams prepared three reports. The first dealt primarily with the expenses sought by the Plaintiff in its claim for stranded pre-construction costs. The second was a rebuttal report responding to Mr. Whelan's evaluation of the value of the polypropylene plant opportunity. The

third was a surrebuttal report responding to a late filing by the Plaintiff of missing supporting materials for certain pre-construction expenses.

[64] Mr. Adams' evidence was necessary and helpful to the court and there is no need for more detailed descriptions of the services provided, as the reports speak for themselves as to the work performed. His charges are to be recovered without reduction.

Pre-Trial Applications

[65] The Plaintiff objects to the inclusion of costs associated with two pre-trial applications. The first was an unsuccessful application by the Defendants for security for costs heard by Eamon J of this court on December 13, 2017. The second was an application for a consent order waiving mandatory mediation, which was granted by Justice Miller on November 22, 2022, on the basis that "there shall be no costs awarded to any party from this application."

[66] I agree with the Plaintiffs that the legal fees component of the costs to be recovered should be exclusive of those two applications.

The Post-Trial Anti-Suit Injunction Application

[67] On March 9, 2023, after the parties had closed their respective cases at trial, the Defendants advised the court of their intention to apply for an anti-suit injunction. If granted, the injunction would have ordered that the Plaintiff not proceed with trial of the action brought in Texas, at least until my decision had been issued. At the time, the Texas jury trial was scheduled to proceed in mid-May 2023.

[68] The application was heard on April 12, 2023. A decision was rendered on May 1, 2023.

[69] I found that while a permanent injunction may have been available had the application been made in a timely manner, it would be inequitable to enjoin the Plaintiff from proceeding with the Texas tort action at such a late stage. A temporary injunction pending my decision would also not materially reduce cost and the risks of inconsistent findings of fact on common issues and was not appropriate either.

[70] No decision was made with respect to costs. Counsel agreed that they should be addressed after the trial decision because the issues were intertwined.

[71] The Plaintiff argues that there should be no recovery of legal fees for the anti-suit application by the Defendant, and in fact it is the Plaintiff who should receive such costs due to its success.

[72] I find that that the fees associated with the anti-suit injunction from March 9, 2023, onward should be excluded from the cost award. Canadian legal services prior to that time relating to that potential remedy are properly recoverable.

[73] I do not agree that the Plaintiff should recover its costs associated with the anti-suit injunction. The issues raised at trial were indeed closely intertwined with those being litigated in Texas. The anti-suit injunction was not denied because it lacked merit, but because it was too late to meaningfully reduce the costs of duplicative litigation and the risk of inconsistent findings of fact. In the circumstances, the Plaintiff is not entitled to costs in respect of that application.

Next Steps

[74] Once the Review Officer's assessment is complete, and assuming that there is no need for further direction from this Court, the Defendants shall prepare an Order for review and agreement as to form and content by the Plaintiff. The Order shall then be provided to me for endorsement.

Dated at the City of Calgary, Alberta this 18th day of March, 2024.

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

Appearances:

Peter T. Linder, K.C.
S.B. Gavin Matthews and
Christopher Darwish
for the Plaintiff

Maureen Killoran, K.C.,
Melanie Gaston,
Olivia C. Dixon,
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