CITATION: Avedian v. Enbridge Gas Distribution, 2024 ONSC 5285
COURT FILE NO.: CV-12-458715
DATE: 20240924

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bedros (Peter) Avedian, Claudio Petti, and Mario D'Orazio, Plaintiffs

AND:

Enbridge Gas Distribution Inc., operating as Enbridge Gas Distribution, Enbridge Solutions Inc., operating as Enbridge Energy Solutions, Enbridge Inc., Lakeside Performance Gas Services Ltd., operating as Lakeside Gas Services, Defendants

AND:

Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey, Third Parties

AND:

TBQ Heating and Air Conditioning, Brentol Bishop a.k.a. Brent Bishop, Enbridge Solutions Inc., operating as Enbridge Energy Solutions and Enbridge Inc., Fourth Parties

BEFORE: Darla A. Wilson J.

COUNSEL: *Christine G. Carter*, *Jean Pierre Bouchard*, Counsel for the Plaintiffs

James G. Norton, Counsel for the Defendants Enbridge Gas Distribution Inc. and Lakeside Performance Gas Services Ltd. operating as Lakeside Gas Services

C. Kirk Boggs, Counsel for the Third Parties Alpha Dey Heating and Aubrey Leonard Dey

Chris Morrison, Counsel for the Fourth Parties TBQ Heating and Air Conditioning and Brentol Bishop a.k.a. Brent Bishop

David Reiter, Counsel for the Fourth Parties Enbridge Solutions Inc. operating as Enbridge Energy Solutions and Enbridge Inc.

HEARD: In Writing

ENDORSEMENT ON COSTS OF MOTIONS

[1] From August 2021 until May 2024, I was the case management judge for this action, which arose from an explosion at an apartment building that occurred in 2010. Upon counsel's request and with their consent, I was also appointed the trial judge. In February 2024, I heard three motions: (1) the Plaintiffs' motion to strike the opposing parties' pleadings for the failure to disclose settlement agreements; (2) the Defendants', Third, and Fourth Parties' motion for directions concerning the proper damage claims at trial; and (3) the Plaintiffs' motion for my recusal as the case management and trial judge. I dealt with these motions in my written reasons released on April 22, 2024. Unfortunately, counsel were unable to agree on costs. As a result, the costs must be determined.

[2] Counsel for the Plaintiffs raised an objection to my dealing with the costs of these motions given my elevation to the Court of Appeal for Ontario on May 1, 2024. As a result, I confirmed to all counsel that in accordance with s. 13 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), I received the approvals of Chief Justice Tulloch and Chief Justice Morawetz to determine costs.

[3] I received written submissions from counsel that I have reviewed and considered. Counsel for the Fourth Parties Enbridge Solutions Inc. did not participate in these motions. As I have done throughout, I will refer to the Defendants, Enbridge Gas Distribution Inc., Enbridge Solutions Inc., Enbridge Inc., and Lakeside Performance Gas Services Ltd., the Third Parties, Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey, and the Fourth Parties, TQB Heating and Air Conditioning Inc. and Brentnol Bishop, A.K.A. Brent Bishop, collectively as the "Defendants" for ease of reference and because they provided a joint submission on costs.

[4] The motions brought by the Plaintiffs were dismissed. The motion brought by the Defendants for directions determined that the Plaintiffs' latest theory of damages, as articulated in the expert report of Janterra, would not be permitted to be advanced at trial.

Positions of the Parties

[5] The Defendants seek substantial indemnity or full indemnity costs of the three motions, arguing that these motions were unnecessary and were part of the Plaintiffs' pattern of behaviour, which is described as the "scorched earth" approach to litigation, and cannot or should not be countenanced by the court. The Defendants submit that at every step, the Plaintiffs attempted to frustrate the case management process by bringing frivolous motions, appealing every decision to the fullest extent, and essentially trying to blindside the Defendants on the damages at trial.

[6] The Defendants seek costs of the three motions, inclusive of disbursements and HST of $269,500.50, on a full indemnity scale or alternatively, fixed at $262,775.23 on a substantial indemnity scale or fixed in the sum of $175,346.78 on a partial indemnity scale. These amounts are comprised as follows, using the full, substantial, and partial indemnity amounts: (1) the Plaintiffs' motion to strike the pleadings, costs of $56,761.60, $55,343.82, or $36,912.64; (2) the Defendants' motion for directions, costs of $131,490.76, $128,213.22, or $85,605.25; and (3) the Plaintiffs' motion for recusal, costs of $81,248.14, $79,218.19, or $52,828.89.

[7] The Plaintiffs submit that they were successful on the motion for directions because Janterra's expert report was not excluded and the Plaintiffs intend to use it at trial. The Plaintiffs seek costs of the motion for directions fixed at $20,050 on a partial indemnity basis.

[8] With respect to the Plaintiffs' motion to strike the opposing parties' pleadings, it is submitted that there should be no order as to costs, or alternatively, a costs order of $28,000, which is very generous. Finally, concerning the recusal motion, this was a straightforward motion that took a half day to argue, and it is suggested a costs award of $8,000-$10,000 is reasonable.

[9] Additionally, the Plaintiffs seek costs thrown away for trial preparation for the trial that was fixed to commence in January 2024 in the sum of $21,125 plus HST.

[10] The Plaintiffs disagree that there has been any conduct that justifies a costs order on an enhanced basis. The Plaintiffs exercised their rights of appeal, which they are entitled to do. If the court determines that the Defendants are entitled to any costs, the Plaintiffs ask that this amount be set-off against a future judgment.

Background

[11] To employ the descriptor used by Pepall J.A. in her decision from February 2023, this action has had a "tortuous" history. When I assumed the role of case management judge in August 2021, the examinations for discovery had been completed and there had been a fixed 50-day trial date set by the previous case management judge. There had also been a partial summary judgment motion heard and granted that was set aside by an order of the Court of Appeal for Ontario dated May 31, 2021. In that order, the court directed the action be restored to the trial list on an expedited basis.

[12] From the inception of my time as the case management judge, the Plaintiffs consistently indicated they were ready and anxious to proceed to trial. Indeed, in May 2022, counsel for the Plaintiffs asked Huscroft J.A. to fix a trial date no later than June 2022, which he declined to do, noting that I was the case management judge and was therefore in the best position to determine trial readiness. The Plaintiffs appealed or sought leave to appeal many of the decisions I made as case management judge, both to the Divisional Court and the Court of Appeal for Ontario. All were unsuccessful and costs were awarded for each motion.

[13] The issue that precluded this action moving forward to trial from August 2021 until February 2024 was the lack of clarity concerning the damages the Plaintiffs intended to pursue at trial. At approximately the same time I became involved in this case, the Defendants made a formal admission of liability for the explosion, which simplified the case, narrowed the issues for trial, and rendered the action an assessment of damages only. At that point, the action should have been ready to fix a new trial date.

[14] The reason that the case did not move forward to trial lies solely with the Plaintiffs for their refusal to commit to a theory of proper damages. This position necessitated a motion on a proposed amendment to the statement of claim, which I heard in March 2022 and dismissed with lengthy written reasons in June 2022. The Plaintiffs appealed that order to the Court of Appeal for Ontario and their appeal was dismissed by reasons released in April 2023.

[15] Following the decision of the Court of Appeal for Ontario, counsel indicated they were content to fix a trial date, which I set for January 2024. The Plaintiffs then served an expert report from Janterra containing a new theory of damages, which the Defendants objected to on the basis that it had not been pleaded or advanced in the litigation. Once again, the Plaintiffs' position

necessitated a motion for directions for a determination on the ambit of the damages the Plaintiffs could advance at trial. This motion, and the Plaintiffs' other two motions, resulted in the trial date being vacated.

[16] I included a brief summary of the history of my involvement as case management judge to provide context for the three motions for which I am determining costs. These are not standard, garden variety motions that are commonly heard in civil actions.

[17] In my view, the motion for directions should not have been necessary, as my decision on the Plaintiffs' motion to amend the statement of claim to plead different damages clarified the issue of what damages could be claimed in this action. The motion to strike the Defendants' pleadings and the motion for recusal were unnecessary and resulted in trial delay.

[18] There has been virtually nothing in this case that proceeded on a consent basis. Each issue has required an adjudication. Indeed, the parties could not settle the form of the order arising from my decision on the motions without providing submissions, which necessitated yet another endorsement.

Analysis

[19] Section 131(1) of the *Courts of Justice Act* confers on judges the discretion to fix costs of a step in a proceeding, including to what extent costs shall be paid. Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"), sets out the factors the court may consider when determining costs:

> **57.01** (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,

> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
> (h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and
> (i) any other matter relevant to the question of costs.

[20] The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).

[21] Costs on an enhanced scale are a departure from the usual rule that costs follow the event on a partial indemnity scale. The Defendants were successful on all three motions and are entitled to their costs. The issue for me to decide is the scale and quantum of those costs.

[22] In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. described the circumstances when elevated costs are warranted as "only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

[23] The court reviewed this area again in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.) at p. 37, citing Mark M. Orkin, *The Law of Costs*, 2nd ed. (Aurora: Carswell, 1993), at pp. 91-92, and set out the type of circumstances in which a higher costs scale is appropriate:

> An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to mark the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus:
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> > [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. [Citations omitted].

[24] In *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, the court identified when the imposition of a higher level of costs was appropriate. Specifically, at para. 46, the court noted that a party was entitled to advance their position; they were not required to settle. If, on the other hand, a party abuses the process of the court, that type of wrongdoing warrants a rebuke from the court in the form of an enhanced level of costs: see *Davies* at para. 46.

[25] In *Davies* at paras. 51-52, quoting from *Andersen v. St. Jude Medical, Inc.* (2006), 264 D.L.R. (4th) 557 (Div. Ct.), the Divisional Court set out several principles that must be considered when awarding costs:

> (1) The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1).

(2) A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant.

(3) The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable.

(4) The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.

(5) The court should seek to balance the indemnity principle with the fundamental objective of access to justice.

As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, at para. 37, where Armstrong J.A. said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice". [Citations omitted.]

[26] The Plaintiffs were wholly unsuccessful on the two motions they brought. Counsel's submission that the Plaintiffs were successful on the motion for directions is inaccurate. Ms. Carter submits that the Janterra report can be used at trial. That, too, is incorrect. The Plaintiffs can describe the damages claim in whatever language they wish, but the decision on the motion for directions determines that no reinvestment claims can be advanced at trial by any of the Plaintiffs. As a corollary, a report premised on that theory cannot be admitted into evidence. The motion to strike the pleadings was dismissed.

[27] The Plaintiffs' motion for my recusal as both case management and trial judge was dismissed. This was an unnecessary motion unsupported by the evidence or the jurisprudence. It was tactical in nature and ought not to have been brought, particularly when the Plaintiffs had previously concurred with my appointment as both the case management and trial judge. Parties cannot "judge shop" when the case management judge makes a ruling that is not in their favour.

[28] The motion for directions was necessitated by the unreasonable position taken by the Plaintiffs in their refusal to accept the dismissal of their motion to amend the statement of claim, despite the Court of Appeal for Ontario affirming that decision. Again, the Plaintiffs' intention to advance a new damages claim notwithstanding the orders of the court was a tactical motion

designed to circumvent the court orders. It was this position that resulted in the adjournment of the January 2024 trial date and contributed to the delay about which the Plaintiffs complain. The Plaintiffs' actions have resulted in additional costs to the Defendants, which I will fix the costs of the motion for directions on a substantial indemnity scale, given the history of this action.

[29] The Plaintiffs' motion seeking to strike the defences for failure to disclose alleged settlement agreements was ill-conceived. The costs award for that motion shall be on a partial indemnity scale.

[30] With respect to the motion for my recusal, I note the solicitor for the Plaintiffs did not raise any issue with me directly concerning an apprehension of bias. Instead, she wrote to the Regional Senior Justice in Toronto demanding my removal from the case for bias. That was incorrect procedurally. It was only after prodding from defence counsel at a case management meeting that the solicitor for the Plaintiffs acknowledged her letter to the Regional Senior Justice. In my view, that was highly inappropriate, and disrespectful to the court. The bringing of a tactical motion is an example of the type of conduct that must be denounced by the imposition of a costs order on a substantial indemnity basis.

[31] There is no basis for the Plaintiffs' request for costs thrown away for trial preparation done by Mr. Bouchard. The trial date was fixed on the basis that the issues arising from the Plaintiffs' damages had been settled and that counsel were ready for trial. It was the fact that the Plaintiffs intended to rely on a new report from Janterra report which contained a different theory of damages, that led to the need for the motion for directions and the adjournment of the trial date.

[32] Turning to the appropriate quantum, and considering the factors enumerated in r. 57.01 of the *Rules*, I must award a sum that is reasonable in the circumstances. I am mindful of the fact that the Defendants' counsel provided joint submissions in order to minimize overlapping work. Counsel acknowledged that the amounts sought are much higher than would normally be awarded for motions, but they stress that given the types of assertions being made, the necessary materials required a great deal of work. Counsel made the argument that their clients were required to respond to these motions, and in doing so, they have incurred exorbitant costs. As well, the Plaintiffs' motions were rejected in their entirety, and the Defendants' motion was found to be reasonable and their position accepted by the court. I agree.

[33] I have reviewed the bills of costs that were provided. In my view, the hourly rates charged by senior counsel are reasonable. When there are numerous counsel working on a matter, there will be some duplication of work and some of the hours are higher than they otherwise would have been. Turning to the motion to strike the defences, counsel for the Defendants seek $36,912.64. In my view, that is on the upper-end of the reasonable scale. I fix the costs of the motion to strike the Defendants' pleadings on a partial indemnity scale at $30,000, all inclusive.

[34] The motion for directions was a more complicated motion. The solicitor for the Plaintiffs submits that her clients were successful on the motion and relies on a new report from Janterra dated June 5, 2024 in which the author comments on whether or not their damage calculation complied with my directions. To be clear, the Plaintiffs were not successful on the motion for directions as the reinvestment theory was not permitted to be advanced and that was the "new" theory set out in the Janterra report. The comments from Janterra contained in their most recent

report opining on the meaning of my reasons are irrelevant. There is no basis for the Plaintiffs to be awarded costs on this motion and I decline to do so. The Defendants are entitled to their reasonable costs on a substantial indemnity basis which I fix in the amount of $100,000. This sum is fair and reasonable, given the importance of the issue, the fact that he motion should not have been necessary, the prior decisions, and the conduct of the Plaintiffs.

[35] Finally, I turn to the motion for recusal and the appropriate quantum of costs on a substantial indemnity basis. The Defendants seek the sum of $79,218.19. The solicitor for the Plaintiffs submits that it was a half day motion with responding materials and no cross-examinations, and this amount is excessively high. While I accept the time was spent, in my view, the number of hours is high. I fix the costs of the motion for recusal on a substantial indemnity basis in the sum of $65,000, an amount I consider to be reasonable in the circumstances.

[36] In their written submissions, the Plaintiffs submit that a high costs order raises issues of access to justice. Furthermore, they request that any costs award be set-off against a future judgment. I do not accept either submission. The Plaintiffs are sophisticated businessmen. The building where the explosion occurred was purchased by the Plaintiffs shortly before the explosion and the shares sold five years later for a price in excess of $16 million more than the purchase price. The Plaintiffs have filed no evidence to support the contention that a costs order could not be paid or that to do so would cause significant hardship. The Plaintiffs have chosen to proceed with this litigation in an aggressive fashion. When they did not like or accept a ruling of the court, they appealed it or sought leave to appeal it. That is their prerogative as litigants. However, that conduct results in delay in proceeding to trial and if steps taken are unsuccessful, there is a risk of an adverse costs order, which is what has occurred in this case.

[37] The Plaintiffs have the financial ability to pursue this claim aggressively, bringing motions for leave to appeal and appeals, unlike the vast majority of litigants. If they are unsuccessful in this strategy, then they must pay the costs, consistent with the requirements of the *Rules*. Similarly, there is no basis to depart from the usual rule that costs are fixed and payable at each step of an action. The suggestion that the costs order for these motions presents an access to justice issue is without merit. The costs are fixed, totaling $195,000, and they are payable forthwith by the Plaintiffs to the Defendants.

Darla A. Wilson

Date: September 24, 2024