CITATION: *City Of Kawartha Lakes v. Gendron et al* ONSC 4603
COURT FILE NO: CV 11-072
DATE: 20220808

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Corporation of The City of Kawartha Lakes, Plaintiff

AND:

Wayne Gendron, Liana Gendron, Doug C. Thompson Ltd., operating as Thompson Fuels, Her Majesty The Queen in Right of Ontario, Technical Standards and Safety Authority, D.L. Services Inc., R. Ian Pepper Insurance Adjusters Inc., Farmers' Mutual Insurance Company and Les Reservoirs D'acier De Granby Inc., Defendants

BEFORE: J.C. Corkery J.

COUNSEL: Christine G. Carter, for the Plaintiff
Martin P. Forget for the Defendants, Wayne Gendron and Liana Gendron
William G. Scott for the Defendant, Farmers' Mutual Insurance Company
Albert Wallrap for the Defendant, Doug C. Thompson Ltd. operating as Thompson Fuels

HEARD: December 16 and 17, 2021 and February 3, 2022

REASONS FOR DECISION ON COSTS

[1] After an oil spill in 2008 followed by twelve years of protracted litigation this matter came to a conclusion when I released my decision on July 30, 2021. The defendants, Wayne Gendron, Farmers' Mutual Insurance Company and Thompson Fuels were successful on their motions.

[2] Mr. Gendron seeks his costs in the amount of $846,053.04 and disbursements in the amount of $51,058.42.

[3] Farmers' Mutual seeks its costs in the amount of $335,977.48 and disbursements in the amount of $27,322.23.

[4] Thompson Fuels seeks its costs in the amount of $173,984.63 and disbursements in the amount of $1,991.05.

[5] All of these amounts are inclusive of H.S.T.

[6] Awarding costs is a discretionary exercise: s. 31 of the *Courts of Justice Act*. That discretion is exercised in accordance with the factors set out in Rule 57.01 of the *Rules of Civil Procedure*. The court must consider what is "fair and reasonable" in fixing costs with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario),* 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[7] Rule 57.01 of the *Rules of Civil Procedure* identifies the factors a court may consider when exercising its discretion to award 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; and
>
> (i) any other matter relevant to the question of costs.

[8] Rule 57.01(4) allows for elevated levels of costs:

> 57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
>
> …
> (c) to award all or part of the costs on a substantial indemnity basis;

A. Substantial indemnity costs

[9] In my reasons on the motions I determined:

a. that Gendron is entitled to costs payable by the City on a partial indemnity basis until February 22, 2016 and on a substantial indemnity basis after February 22, 2016 (paragraph 113);

b. that Farmers' Mutual is entitled to costs payable by the City on a partial indemnity basis until October 1, 2012 and on a substantial indemnity basis after October 1, 2012 (paragraph 109, corrected to change the year from "2014" to "2012"),

c. and that Thompson Fuels is entitled to costs on a substantial indemnity basis (paragraph 110).

[10] The costs claimed by the defendants reflect this determination.

[11] The principles for assessing when substantial indemnity costs are appropriate (apart from an offer to settle under Rule 49.10) were reviewed by the Ontario Court of Appeal in *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239 (CanLII):

> [43] The applicable principles can be summarized as follows:

> a. the fixing of costs is discretionary and the motion judge's costs award attracts a high level of deference – it should be set aside on appeal only if the trial judge erred in principle or if the award is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27;
>
> b. costs on a substantial indemnity basis should only be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134; and
>
> c. the kind of conduct that will justify an elevated level of costs is not limited to conduct in the proceedings and can include the circumstances that gave rise to the litigation: *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA), 17 O.R. (3d) 1 (C.A.), at p. 23; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 30.

[12] These principles were affirmed recently in *Krieser v. Garber*, 2020 ONCA 699 (CanLII):

> [137] Substantial indemnity costs, because of a losing party's behaviour, should be "rare and exceptional" absent applicable settlement offers: *Whitfield v. Whitfield*, 2016 ONCA 720, 133 O.R. (3d) 753, at para. 23. They should only be ordered "where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties" in the circumstances giving rise to the cause of action or in the proceedings: *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134. The fact that a defence has little merit or is ultimately unsuccessful is no basis for awarding substantial indemnity costs: *Mortimer v. Cameron* (1994), 1994 CanLII 10998 (ON CA), 17 O.R. (3d) 1 (C.A.), at p. 23. Nor does pleading guilty in criminal or regulatory proceedings alone merit elevated costs: *Foulis v. Robinson* (1978), 1978 CanLII 1307 (ON CA), 21 O.R. (2d) 769 (C.A.) at p. 776.

[13] In this case, the City:

a. engaged in duplicitous proceedings;

b. commenced an action against the defendants in negligence although the only resolution of council, dated February 2, 2010, did not authorize a civil action in negligence;

c. raised groundless claims against Farmers' Mutual, that FM should not have retained DL Services and that FM wrongly caused the Ministry of the Environment section 157 Order to be made against the City and alleging that the insurance proceeds had not been expended in a way that the City wanted the money to be spent;

d. Refused to admit that Farmers' Mutual did not own or control the furnace oil;

e. improperly claimed $148,686.91 in legal costs in its s. 100.1 order when it knew that these were clearly not "incurred" to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment as stipulated by s. 100.1(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*");

f. deliberately concealed the nature of the $148,686.91 by labelling it "accounts" and refusing to provide particulars of those accounts, as required by s.100.1(1)(3)(b) of the *EPA*, and not attaching the invoices and other supporting documentation, as required by s. 100.1(1)(3)(c) of the *EPA*;

g. in pursuit of double recovery, was prepared to sell the Gendron house relying on its priority lien;

h. developed a plan to recover the $148,686.91 and other unrecoverable expenses by artificially manipulating the settlement with the co-defendants such that the settlement monies would contribute to the "accounts" (the improper and unreasonable legal expenses), so that it could pursue the Gendrons for "clean" invoices under s. 100.1(1);

i. planned to saddle the Gendrons with the payment of the "clean" Golder invoices while City used the settlement funds to recover the unrecoverable $148,686,91, allowing it to double recover at the expense of Mr. Gendron, who was at risk of losing his house;

j. in December 2014, and September of 2015, misrepresented to the ERT that "the City's action is 'tentatively settled' with all parties, with the exception of Gendron and his insurer, subject to the ERT hearing taking place as soon as possible", in direct contradiction to the admission by Ms. Carlson under

cross-examination that there had been no offer made in December 2014 nor September 2015 nor October 2015;

k. falsely represented through its counsel Ms. Carlson, by affidavit sworn December 14, 2015, that "the settlement…provides that the defendants to the City's action with the exception to the Gendrons and the insurer are contributing to some but not all of the invoices" when there was no such segregation of invoices provided for in the settlement;

l. falsely represented in the same affidavit that "The settlement is conditional on the hearing taking place as scheduled starting February 22, 2016" and that "the settlement will be void if the hearing does not take place then";

m. acknowledged it had a "binding settlement" as of December 14, 2015, yet it refused to disclose the terms of settlement;

n. falsely represented the terms of the partial settlement to the ERT on January 7, 2016, falsely stating that the settlement is conditional on the hearing taking place as scheduled (February 22, 2016) and that it will be void if the hearing does not begin then or reasonably shortly thereafter;

o. failed to comply with Justice McKelvey's February 12, 2016 direction to serve its motion material for the bar order, which would have included disclosure of the settlement agreement which would have revealed no segregation of invoices and that there was no condition that the agreement would be void if not commenced on February 22, 2016;

p. served a Notice of Motion on February 12, 2016 (prior to the February 22, 2016 ERT hearing), that sought a dismissal of the action *without costs* – consistent with the settlement agreement – but then, on March 31, 2016, after the ERT hearing was complete, amended its Notice of Motion reversing its position and seeking *the costs of the entire action* against the Gendrons;

q. refused to disclose the settlement agreement before the February 22, 2016 ERT hearing, despite the requests of the defendants, Thompson, DLS and TSSA that it be placed before the ERT;

r. having received from Thompson a draft Pierringer Agreement on January 27, 2016 – 25 days prior to the ERT hearing – the City only responded March 4, 2016 after the ERT hearing was complete, with an amended Pierringer Agreement reneging on the terms of the binding agreement set out in the December 14, 2015 e-mail exchange;

s. on April 25, 2016, first produced Schedules "A" and "B", purportedly segregating the invoices and falsely claiming the settling defendants had paid the expenses of Schedule "A";

t. refused to acknowledge it had waived solicitor-client privilege and refused to comply with the order of Master Brott to produce documents, requiring further attendances before Master Brott;

u. refused to agree to postpone the public sale of the Gendron house pending the hearing of these motions when the motions' hearing was delayed in the fall of 2019; and

v. refused to pay the costs ordered by Master Brott in November 25, 2019 and August 22, 2020, and the costs ordered by Justice Bale on June 21, 2020, all of which were made payable forthwith.

[14] This is reprehensible conduct.

[15] A party is entitled to employ whatever litigation strategy it deems fit. The City can adopt, as it did here, an aggressive "scorched earth" strategy where "no issue was conceded and every possible legal argument, no matter how tenuous, was advanced". There are consequences. The City must live with the increased costs which flow from such a strategy: *Labanowicz v. Fort Erie (Town)*, 2018 ONCA 343 (CanLII), at para 26.

[16] However, in this case the City was not simply aggressive. From the outset, the City withheld, supressed and misrepresented critical information to the detriment of all three remaining defendants. This is not a litigation strategy it is entitled to employ. It is reprehensible and sanction-worthy. It not only increased the costs incurred by the Gendron, Farmers' Mutual and Thompson Fuels, but they incurred costs that they never should have. Accordingly, costs awarded on a substantial indemnity basis is warranted.

B. Rule 57.01(1) factors

[17] I have considered all of the factors set out in Rule 57.01(1).

[18] All of the lawyers' rates are reasonable considering their experience. The rates are consistent with Ms. Carter's hourly rate and are significantly less than the hourly rates the City was charged by the firm it retained to act its *EPA* appeal.

[19] The hours spent are reasonable and wholly consistent with what the City would reasonably expect to pay. Although the City did not provide a bill of costs in its submissions on costs, the City's legal costs were disclosed during the litigation and are significantly higher than what the defendants' seek. I am satisfied that there is no claim for work that has already been claimed in other costs orders.

[20] This was a complex and lengthy proceeding due to both the issues involved and the conduct of the City. The litigation included multiple court and ERT attendances. There were 38 case management conferences before Mr. Justice McKelvey, nine days of examinations for discoveries, two days of mediations, multiple days of cross examinations, preparation of voluminous motion material and multiple factums, as well as both oral and written submissions and, ultimately, attendance at what amounted to a ten-day hearing. The written material filed included more than 20 banker's boxes. The "Compendium of Evidence" (Volume 16 of 16) for the motions was 5,161 pages.

[21] I am satisfied that the costs related to the ERT hearings are recoverable in this court. Those proceedings were incidental to these proceedings. In convincing the ERT to schedule a hearing, CKL consented to having the issue of costs incurred referred to the

Superior Court. The ERT confirmed that position in its endorsement on January 22, 2016, wherein it stated "The City acknowledges that some adjudication by the Superior Court may be necessary to address set-off and litigation costs issues." These costs could not have been addressed by the ERT.

[22] Apart from my consideration of the City's conduct in determining that this is a case that warrants costs on a higher scale, I have also considered the City's conduct, summarized above, under the Rule 57.01 factors. As I have already discussed, many of the steps taken by the City in this proceeding were improper, vexatious or unnecessary. These misguided steps significantly complicated and lengthened each stage of the proceeding needlessly. The matter should have concluded long ago.

[23] The City denied or refused to admit many things that should have been admitted.

[24] The City commenced separate proceedings and pursued both at the same time for the same relief.

C. Conclusion – costs assessed

[25] The City shall pay Mr. Gendron his costs fixed in the amount of $845,000 plus disbursements in the amount of $51,058.42.

[26] The City shall pay Farmers' Mutual its costs in the amount of $335,000 plus disbursements in the amount of $27,322.23.

[27] The City shall pay Thompson Fuels its costs in the amount of $174,000 and disbursements in the amount of $1,991.05.

J.C. Corkery J.

Date: August 8, 2022