Court of King's Bench of Alberta

Citation: Signalta Resources Limited v Canadian Natural Resources Limited, 2024 ABKB 115

Date: 20240229
Docket: 1001 17217
Registry: Calgary

Between:

Signalta Resources Limited

Plaintiff

- and -

Canadian Natural Resources Limited

Defendant

Costs Decision
of the
Honourable Justice EJ Sidnell

Introduction

[1] This trial was heard over 14 days, between October 18 and November 5, 2021. Closing briefs were exchanged and final argument took place over two days: February 9 and 10, 2022. Further briefs were filed after closing argument. I issued my decision on the merits on February 24, 2023: ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2023 ABKB 108 (the Decision). The plaintiff, Signalta Resources Limited (SRL), was substantially successful in its claim against the defendant, Canadian Natural Resources Limited (CNRL).

[2] At para 975 of the Decision, I awarded costs to SRL and advised the parties that if they could not agree to costs, they could seek further directions. On January 29, 2024, I heard SRL's costs application to determine its entitlement to costs (the Costs Application). These are my reasons on the Costs Application.

[3] SRL initially applied to set its costs at $5,974,704.28, inclusive of disbursements, calculated as follows:

(a) 50% of SRL's actual legal fees up to April 12, 2019;

(b) 50% of SRL's actual legal fees after April 12, 2019, multiplied by two pursuant to a Formal Offer to Settle served on CNRL on April 12, 2019 (the Formal Offer); and

(c) 100% of SRL's disbursements in the amount of $1,461,448.08.

[4] At the Costs Application, SRL resiled from seeking a percentage of its actual legal fees and acknowledged that if a percentage of fees is awarded under Rule 10.31(1), of the *Alberta Rules of Court*, AR 124/2010, it would be applied to reasonable and proper costs.

[5] An added complexity is that SRL takes the position that portions of the invoices issued by its counsel are privileged and confidential and cannot be fully disclosed to the Court or to a review officer as defined in Rule 10.1(b) (a Review Officer) because CNRL has appealed the Decision. In addition, the parties advised at the Costs Application that the appeal is paused pending my decision on the Costs Application.

[6] CNRL takes no issue with the amount claimed by SRL for disbursements but submits that the appropriate method of awarding costs is to apply two times Column 5 costs as set out in Schedule C of the *Rules of Court*, which it calculates as being $566,190.00, plus disbursements, for a total of $2,027,638.08.

[7] While CNRL maintains that Schedule C costs are appropriate in this case, it also submits:

(a) in the event that a percentage of costs is to be applied, then it should be 40-50% of reasonable and proper costs, not SRL's actual legal costs;

(b) SRL's actual legal fees are disproportionate to those incurred by CNRL and SRL has failed to prove that its actual legal fees are reasonable and proper;

(c) SRL has failed to provide relevant details concerning the actual legal fees incurred as required by the Court of Appeal in ***McAllister v Calgary (City)***, 2021 ABCA 25;

(d) based on its claim stated in its first brief, which was later slightly reduced in a reply brief, SRL seeks to recover 84.5% of its actual legal fees; and

(e) the formal offer provisions of the *Rules of Court*, particularly Rule 4.29(1), specify that the consequence of not accepting a formal offer to settle applies to Schedule C costs only and does not operate to double a costs award based on a percentage of costs.

[8] This case shares some characteristics with ***McAllister*** in that the Costs Application is brought under Rule 10.31(1)(a); however, in this case SRL relies on Rule 10.31(1)(b). This is not a case where it is "necessary to employ the costs award as an instrument of policy or to accomplish any purpose other than that of partially indemnifying the successful party": ***McAllister*** at para 2. I am satisfied that counsel acted reasonably in their pursuit and defence of the claim and there is no need to discourage unnecessary litigation steps taken or to sanction obstructive behaviour: ***McAllister*** at para 35. Unlike ***McAllister***, SRL relies on the formal settlement offer rules.

[9] The applicable Rules are set out in Appendix A to these reasons.

Issue 1: What is the appropriate approach to costs in this case?

Should Schedule C costs be the starting point?

[10] SRL submits costs calculated under Schedule C are not appropriate and that, under Rule 10.31(1)(a), this Court should award a percentage of its reasonable and proper costs that it incurred to carry on the action. Relying on ***McAllister***, SRL asserts that it is entitled to costs in the amount of 40-50% of its reasonable and proper costs, though it submits that the recovery should be set at 50%, being the high end of that range.

[11] In the alternative, SRL submits that it should be awarded costs under Rule 10.31(1)(b) in an amount that the Court considers to be appropriate in the circumstances, being either (i) an indemnity to SRL for its lawyer's charges, or (ii) a lump sum.

[12] Also relying on ***McAllister***, CNRL submits that Schedule C must be considered when deciding what are reasonable and proper costs and can also be used as a reference tool to perform a reality check when determining appropriate costs: ***McAllister*** at paras 27-29 and 58-61.

[13] CNRL also relies on ***Barkwell v McDonald***, 2023 ABCA 87, leave to appeal to SCC refused, 40742 (2 November 2023), where, at para 58, emphasis in the original, the Court of Appeal related the recovery of 40-50% of solicitor-client costs to costs awarded under Schedule C:

> The long-established principle is that costs awards are designed to partially, but not fully indemnify the winning party: ***McAllister*** at para 37. It is frequently said that a rough rule of thumb is that the costs award should reflect 40 to 50% of the solicitor and client costs: ***McAllister*** at paras 41-42. That again is not necessarily a reference to the costs incurred and paid by the client, but rather to the costs that should reasonably have been incurred given the issues. This was also the benchmark that was used to set the tariff in Schedule C (***McAllister*** at para 43), and why we stress that a party, regardless of the costs claimed, should always provide as a benchmark a draft Bill of Costs based on Schedule C.

[14] As CNRL points out, SRL did not provide a draft Bill of Costs based on Schedule C; rather CNRL provided a calculation of the costs that SRL would be entitled to based on two times Column 5 under Schedule C: being $566,190.00, not including disbursements.

[15] SRL's draft Bill of Costs sets out 50% of its actual legal costs, less six "no costs orders" and one order for which CNRL was granted costs, totalling $4,732,762.42, not including disbursements. SRL reduced the amount claimed after receiving CNRL's cost brief by $219,406.22 for mediation and JDR costs and $211,359.96 for GST.

[16] CNRL relies on ***Barkwell*** for the proposition that Schedule C costs are the starting point for reasonable and proper costs, but that is not what the Court of Appeal said. At para 53, the Court noted that, while useful, Schedule C is not a mandated default method and, at para 54, where a party seeks a lump sum that party should provide a Schedule C calculation as a benchmark:

> ... The costs award need not be based on Schedule C in the *Rules* and indeed Schedule C is not a mandated default method: ***McAllister*** at para 54. However, as

> ***McAllister*** confirmed at para 58, that does not mean that Schedule C is without utility and "is used day in and day out by judges in a great variety of situations." Using Schedule C has the advantage of providing parties with greater certainty as to their exposure to costs, it is simple, efficient, and inexpensive to apply, and in many cases avoids the need for lengthy inquiries into and assessment of the appropriate level of costs: ***McAllister*** at paras 59-60, 62.
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> Whenever the winning party seeks a lump sum costs award, that party should provide the court, as a benchmark, an assessment of the fees that would be ordered under Schedule C: ***McAllister*** at para 61.

[17] I do not interpret ***Barkwell*** as requiring a party to present a benchmark Schedule C calculation as a prerequisite for a costs application. Further, while there is no particular rule referred to in para 54 of ***Barkwell***, the Court of Appeal notes that a benchmark Schedule C calculation should be provided where the successful party seeks a lump sum costs award. Lump sum costs can be awarded under Rule 10.31(1)(b)(ii). SRL has sought a lump sum costs award in the alternative but did not provide a Schedule C calculation. In any event, CNRL does not assert that SRL cannot proceed with the Costs Application.

[18] While it may be optimal in many cases for a Schedule C calculation to be prepared by the party seeking costs, whether as a basis for an award of costs or to be used as a benchmark, the trial was far more complex than most cases, as discussed below at paragraphs [28] to [30]. In these circumstances, I find that a Schedule C calculation is not necessary for SRL to proceed with the Costs Application.

[19] CNRL also relies on the comments of the Court of Appeal in ***Kantor v Kantor***, 2023 ABCA 329, at para 14, to support its position that without detailed invoices the default should be a Schedule C calculation of costs:

> ... The memorandum of argument and the statements of account do not contain enough information to assess the reasonableness of amounts charged to Ms Kantor, nor the amount it is reasonable to expect the losing party to pay. Without that analysis, Schedule C is the default or fallback.

[20] Ms. Kantor successfully opposed Mr. Kantor's appeal of a decision made in Chambers. Ms. Kantor sought costs on an enhanced basis of 75% of the $17,025 in legal fees and disbursements that she had been charged by her lawyer or, in the alternative, the "normal" scale of costs in the amount of 50% of those legal costs. The Court of Appeal granted Ms. Kantor $6,000 in costs based on an amount between Column 1 and 2 of Schedule C.

[21] The litigation background here is distinguishable from that in ***Kantor*** as this case was unusually complex, both in relation to the facts and the scientific evidence to be applied to them. This dispute was entrenched in highly technical and conflicting scientific evidence, requiring a historical analysis to determine the entitlement to damages, and was rife with procedural and evidentiary challenges, many going to the root of the scientific evidence. Further, SRL's late admission that its detailed invoices may be reviewed to determine what is reasonable and proper, subject to its claim of privilege, makes the comment in ***Kantor***, that Schedule C is the default or fallback, inapplicable to this case. I also find ***Grimes v Governors of the University of Lethbridge***, 2023 ABKB 432, distinguishable from this case.

[22] The *Rules of Court* recognize that there are many types of cases and costs awards must remain flexible and within the discretion of the judge to ensure that the quantum is appropriate in each particular case. Some criticism of Schedule C has been raised because it is not always flexible enough to apply it to a wide variety of cases. In ***McAllister***, at paras 54-55 and 58, emphasis in the original, without questioning that Schedule C is a practical method of determining costs in many cases, the Court of Appeal noted some of the challenges in applying Schedule C to all types of cases:

> Schedule C has been referred to as a "very crude method by which to assess costs" ... and it can be a poor approximator of financial consequences related to undertakings or steps in litigation ... It has also been argued that the level of indemnification in Schedule C does not discourage unnecessary steps in litigation, which is one of the policy goals of awarding or refraining from awarding costs ... A similar concern was raised recently in *Intact Insurance Co v Clauson Cold & Cooler Ltd*, 2019 ABQB 225 by Dilts, J., who indicated that the further Schedule C strays from the real and reasonable costs a party pays for legal fees, the less likely the risk of paying Schedule C costs will act as a tool to promote settlement or that it will affect the conduct of litigation ...
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> ... Schedule C compensates for steps taken in the litigation. But, as noted in *Caterpillar Tractor Co* ..., Schedule C arbitrarily selects certain steps in a lawsuit and compensates parties for taking them, but it omits other steps which can be just as significant to advancing the litigation, and often just as costly. For example, an agreed statement of facts may be a significant step in advancing an action, as was the case here. An agreed statement of facts can be an important tool to ensure trial time is used effectively. However, it is not included as a compensable step in Schedule C. There are many other examples of steps taken to narrow issues, expedite matters, etc. which are not compensable items described in Schedule C such as taking views, conducting inspections and examinations, document organization, etc.
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> ...
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> That said, we should <u>not</u> be taken as questioning the utility of Schedule C, which is provided for in the Rules of Court and which is used day in and day out by judges in a great variety of situations.

[23] In this case, Schedule C is not a necessary starting point or default application. Rather, the appropriate approach is to start with Rule 10.31(1), which starts by directing the Court to consider the factors set out in Rule 10.33(1).

Rule 10.33(1) considerations

[24] I find that I can apply the relevant Rule 10.33(1) factors to this case by addressing them in the following categories:

Result of the action, the degree of success, and the amount claimed and recovered

[25] SRL's economic damages expert calculated its damages based on an assumed production of 2,046,000 mcf of non-solution gas. In the Decision, SRL was almost completely successful in

that it was awarded damages based on an accumulated volume of 1,944,851 mcf of non-solution gas, or 95% of the amount set out in its expert report.

[26] In its Amended Amended Statement of Claim, SRL sought damages in the amount of "approximately $10,800,000". The Decision did not include the monetary value of the judgment as there were calculations to be made to determine the amount. However, that calculation was made after issuance of the Decision and judgment in the amount of $10,772,949 was included in the Judgment Roll, which is only marginally less than the amount claimed.

[27] SRL was almost completely successful at trial as there was a negligible difference between the amount claimed and the damages awarded.

Importance of the issues and complexity of the action

[28] SRL summarized the importance of the issues and the complexity of the action in its Costs Application brief, reproduced below with a correction to the number of expert reports:

> ... The trial involved nine expert witnesses who testified in relation to complex areas of geology, engineering, petrophysics, and damages quantification. In total, [27] primary, rebuttal, and surrebuttal expert reports were exchanged and relied upon at trial.
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> On February 24, 2024, this Court released its reasons for decision, granting judgment in favour of Signalta. The length and complexity of the Court's reasons for decision reflected the complexity and importance of the trial issues: a total of 975 written paragraphs, which involved legal issues including the role and use of expert evidence in litigation, admissibility of expert evidence, weighing of competing admissible expert evidence, the admissibility and use of lay witnesses with specialized knowledge and skills, limitation periods, and the appropriate measure of damages in cases of trespass and conversion, as well as the complex factual findings that needed to be made, based largely upon inferences drawn from expert testimony about what took place in underground geological formations that cannot be directly observed.

[29] SRL submits that the Decision is important for the reasons noted in its brief and because it engaged broad principles of consequence to the resource extraction industry as a whole, most notably the appropriate measure of damages for civil trespass and conversion.

[30] CNRL did not address the Rule 10.33 considerations in its submissions or whether the trial was complex.

Apportionment of liability

[31] There was no apportionment of liability in this trial as there is only one defendant and that defendant was found liable.

Conduct of a party that tended to shorten the action

[32] Other than the preparation of a joint book of exhibits, no conduct of either party could reasonably be found to have shortened the action or the trial.

[33] The Agreed Statement of Facts was prepared only after the evidence had been entered and before closing argument, as it was apparent that there were some facts not in dispute: Decision, para 11. This case should have proceeded only after the parties made best efforts to

agree to, and file, an Agreed Statement of Facts. I have no information to suggest that any draft agreed statement of facts was exchanged before the trial.

Any other matter related to the question of reasonable and proper costs that the Court considers appropriate

[34] SRL also relies on my concerns and findings regarding CNRL's experts: Dr. Hayes and Mr. Beliveau. However, SRL also had some, albeit different, issues with its expert evidence. My findings regarding the expert evidence are set out in the Decision and need not be repeated here.

Rule 10.33(2) considerations

[35] Rule 10.33(2) invites the Court to consider additional factors several of which I will address:

Conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action

[36] This case took approximately ten years to get to trial. The trial was adjourned three times:

(a) once by SRL to amend its pleadings on the eve of trial;

(b) once by SRL due to a medical emergency suffered by one of its experts; and

(c) once because of the Covid-19 pandemic shutdown of the Court.

[37] There was no evidence before me as to whether there were costs awards in relation to the adjournments.

Party's denial of or refusal to admit anything that should have been admitted

[38] There was no evidence that one of the parties denied or refused to admit anything that should have been admitted. However, as I have noted, there was no agreed statement of facts at the commencement of the trial. In my view, both parties failed in their obligation under Rule 1.2(3)(a) to identify, or make an application to identify, the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense.

Whether any application, proceeding or step in an action was unnecessary, improper or a mistake

[39] There was no evidence before me on the Costs Application that either party pursued an application or step which was unnecessary, improper or a mistake.

Contravention of or non-compliance with these rules or an order

[40] During the trial I issued two rulings on the evidence: (1) CNRL's ability to clarify or replace its answers to undertakings for the purpose of trial: ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2021 ABQB 867; and (2) SRL's ability to rely on the documents in possession principle: ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2022 ABQB 89. Success was mixed and both decisions raised the interpretation or application of the *Rules of Court*.

Whether a party has engaged in misconduct

[41] There was no evidence before me on the Costs Application that either party engaged in misconduct.

Any offer of settlement made, regardless of whether or not the offer of settlement complies with the *Rules of Court*

[42] A formal offer of settlement was served on CNRL by SRL on April 19, 2019 (the Formal Offer). The Formal Offer was not accepted by CNRL. SRL submits, and CNRL did not object, that SRL was awarded more in the Decision than the offer contained in the Formal Offered.

[43] The application of the formal offer to settle rules was raised by CNRL. At this point, I note that the Formal Offer was made but explore the consequences of it not being accepted in Issue 5.

A percentage of costs under Rule 10.31(1)(a) is appropriate

[44] Having noted the applicability of some of the Rule 10.33 considerations, and some of the consequences that flow from them, under Rule 10.31(1) I have the discretion to set costs using the methodology that I find most appropriate. Under Rule 10.31(3), this Court has several options for awarding costs, all of which are discussed in ***McAllister***, and encapsulated at paras 29-30:

> To summarize, Schedule C is merely one of a number of options or tools that may be used to achieve the outcome of reasonable and proper costs under Rule 10.31(1)(a). Other options include not making any reference to Schedule C (Rule 10.31(3)(a)); or awarding costs pursuant to "a multiple, proportion or fraction of an amount set out in … Schedule C" (Rule 10.31(3)(b); or awarding a percentage of assessed costs (Rule 10.31(3)(d)).
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> A successful party is entitled either to reasonable and proper costs, as set out in Rule 10.31(1)(a), or to any other amount the court considers appropriate in the circumstances, as set out in Rule 10.31(1)(b). However, if the costs award is to be "the reasonable and proper costs that a party incurred" as provided for in Rule 10.31(1)(a), then the options with respect to making such costs award are set forth in Rule 10.31(3).

[45] I find that Schedule C is not an appropriate method of calculating costs to be awarded to SRL in this case. The Rule 10.33 considerations demonstrate that this case was both complex and important to the industry. As the Court noted in ***McAllister***, at para 41:

> In Alberta, the weight of authority is that party and party costs should normally represent partial indemnification of the successful party at a level approximating 40-50% of actual costs ...

[46] Given the complexity of the case and the number of steps that were taken to bring this matter to trial, I am of the view that the application of the simple litigation steps in Schedule C would not achieve the goal of appropriate partial indemnification of SRL for its reasonable and proper costs.

[47] For instance, this trial relied heavily on scientific evidence. There is no line item for expert reports, let alone complex scientific expert reports, in Schedule C. At two times Column 5 of Schedule C, a litigant would be entitled to $27,000 for trial preparation.

[48] In this case, CNRL takes no issue with SRL's claim for disbursements which included $1,294,888 for the five experts it retained and the 13 expert reports it submitted into evidence. A significant portion of that amount was paid to Mr. Walker who was criticized by one of CNRL's

experts: Dr. Hayes. I found that "Dr. Hayes not only used inflammatory language to criticize Mr. Walker's work but went further and subjected Mr. Walker to inappropriate personal criticism": Decision at para 320. In addition, there is no line item for SRL reviewing the 14 expert reports it received from CNRL's four experts. To describe this case as a "battle of the experts" would be woefully inadequate. This case involved a war undertaken by some of the experts who were not taking prisoners.

[49] Further, Schedule C does not discriminate between document intensive litigation, such as this case, and a case where document review and production is a fairly succinct function.

[50] I do not think that $27,000 for trial preparation in this case would provide for appropriate partial indemnification of SRL.

[51] I find that Schedule C does not include many of the steps that would be expected in complex litigation, as occurred in this case, and would not be an appropriate method of calculating costs. I find that the measure of costs should be awarded as a percentage of the reasonable and proper costs incurred by SRL as provided for under Rule 10.31(1)(a).

Use of the term "indemnification"

[52] In ***McAllister***, at paras 33 and 37, the Court of Appeal commented on the purpose of a costs award being a partial indemnity, which reduced to a successful plaintiff's viewpoint would be:

> A "reasonable and proper costs" award involves a payment by the unsuccessful party to the successful party to indemnify the successful party for expenses incurred as a result of the conduct of the unsuccessful party. The primary purpose of a costs award is to indemnify the successful party in respect of the expenses sustained ... pursuing a valid legal right ... The indemnification is not intended to be complete. Nevertheless, a reasonable level of indemnification of costs incurred is the primary purpose of costs awards. Other considerations may come into play, but only when appropriate. ...
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> It is accepted that indemnification of the successful party should not normally provide full indemnity for all legal fees and disbursements. Instead, a typical costs award (i.e. party and party costs) is intended to be "a partial indemnity for the expenses to which the recipient has been put as a result of the litigation" ... Cost awards in all Canadian jurisdictions typically constitute only partial indemnification of the litigant's legal costs ...

[53] Both SRL and CNRL raised concerns about the use of the term "indemnity" in the *Rules of Court* and the relevant caselaw. In ***McAllister***, the Court of Appeal referred several times to the decision of the Supreme Court of Canada in ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71. In ***Okanagan Indian Band*** the Court addressed the granting of interim costs and, at paras 25-26, the majority commented on the purpose of the traditional costs rules, being designed to indemnify the successful party, and the modern costs rules broadening that purpose to accomplish other litigation objectives:

> As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a

> reasonable settlement offer; this policy has been codified in the rules of court of many provinces ... Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.
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> Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall ... they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

[54] The Alberta Law Reform Institute (ALRI) undertook an extensive review of civil procedure in advance of the *Rules of Court* being brought into force. In Consultation Memorandum No 12.17, *Costs and Sanctions*, issued in February 2005, at para 15, the ALRI commented on costs as follows:

> The Committee is of the view that the most desirable balance of these interests is achieved through a default partial indemnity regime for the recovery of the legal fees component of costs. The Committee also believes that partial indemnity of such costs also provides an appropriate incentive to reach settlements early in the action.

[55] The Courts, in ***Okanagan Indian Band***, ***McAllister*** and ***Barkwell***, and the ALRI in *Costs and Sanctions*, all refer to "indemnification" or "indemnity" in the context of costs. I interpret these references as being applicable to the general principles relating to the awarding of costs. In Rule 10.31, only Rule 10.31(1)(b)(i) uses the term "indemnity". This does not mean that the general principles relating to costs as set out in those authorities only apply to Rule 10.31(1)(b)(i). The general principles are applicable to all of the Rules relating to costs, regardless of whether a particular Rule includes the term "indemnity". Rule 10.31(1)(b)(i) merely describes one mechanism to achieve the partial indemnity discussed in the authorities.

Issue 2: How should reasonable and proper costs be determined?

[56] In its written brief, SRL asserted that this Court could determine that its legal fees were reasonable and proper based on the affidavit evidence before me. I disagree. This Court is not as well equipped, or experienced, as a Review Officer in reviewing legal invoices. Further, the volume of redacted invoices is large and invoice review was not factored into the time allocated for the hearing of the Costs Application. Most importantly, a review cannot be properly undertaken without the invoice details, none of which were provided given SRL's claim of privilege.

[57] The requirement for a detailed analysis was discussed by the Court in ***Kantor***, at para 12:

> Ms Kantor argues that a "normal" scale of costs is 50% of the fees and disbursements actually billed to the successful client, i.e. 50% of "solicitor and own client costs". That is not so. Although passages in *McAllister* ... seem to support Ms Kantor's position, this Court has clarified that *McAllister* does not mean that "the winning party can simply assert the quantum of the fees that was charged by counsel, and paid by the winning party": *Barkwell* ... at paras 53-59. If a party claims costs as a proportion of the amounts billed by their lawyer, a more detailed analysis is needed to determine whether the sums claimed are "reasonable and proper costs" under R 10.31.

[58] In ***McAllister***, at para 46, emphasis in the original, the Court said:

> If the option of awarding costs as a percentage of assessed costs is chosen, the assessment of the costs may require a consideration of what is a reasonable amount which ought to have been charged for the services the successful party's lawyer rendered and that may require reference to the considerations set forth in Rule 10.2(1) which go into the determination of what constitutes a reasonable charge ... If a trial judge chooses to award a percentage of the assessed costs pursuant to Rule 10.31(3)(d) to the successful party, then what is being considered are the "reasonable and proper costs that a party incurred" under Rule 10.31(1)(a). In order to determine whether the costs incurred are reasonable and proper, they must be assessed, either by the party opposite, or by the judge or by an assessment officer. ... [T]he trial judge may direct an assessment of the legal costs by an assessment officer, pursuant to Rule 10.34. Rule 10.31(3)(d) contemplates such an assessment when it speaks of one party being ordered to pay the other "a percentage of <u>assessed</u> costs" ...

[59] I have determined that a percentage of SRL's costs is the most appropriate method of awarding costs. However, the percentage is not applied to the costs that SRL was charged by its lawyers, rather that percentage must be applied to the "reasonable and proper costs" that SRL incurred: Rule 10.31(1)(a).

[60] In this case, I find that it is appropriate to have a Review Officer determine the quantum of SRL's reasonable and proper costs.

Issue 3: When should SRL's reasonable and proper costs be determined?

[61] SRL claims privilege over the contents of the invoices it received from its counsel and notes that the Decision is under appeal. The parties advised that the appeal of the Decision is on hold pending the outcome of the Costs Application.

[62] Neither party objected to me determining the applicable percentage to be applied to SRL's reasonable and proper costs and having the quantum determined after the appeal of the Decision to preserve SRL's claim of privilege.

[63] I agree with this approach. CNRL must be able to review SRL's legal invoices, possibly in a redacted form, as may be directed by the Review Officer, so that it can make meaningful submissions. SRL must also be able to maintain its claim of privilege. By either delaying the determination of the quantum of reasonable and proper costs, or having the Review Officer

provide directions to the parties so that SRL's privilege is maintained, both objectives can be achieved.

[64] SRL is seeking costs as a successful party to the litigation. If SRL is content to wait for the Review Officer's assessment until all appeals are heard, then that is SRL's prerogative. If SRL wishes to initiate contact with the Review Officer to determine if there is a procedure that can be implemented to maintain privilege while the appeal is underway, then SRL can take that step on appropriate notice to CNRL.

Issue 4: What is the appropriate percentage of costs?

[65] As noted by the Court of Appeal in ***McAllister***, at paras 45 and 51, determining the appropriate percentage of indemnification engages numerous factors, and the considerations set out in Rule 10.33 may also be considered:

> ... Suffice it to say that the 40-50% partial indemnification guideline, which has been utilized for a number of years as providing a reasonable level of indemnification, is intended to accomplish the balance discussed in the case law between fully compensating successful parties who through no fault of their own had to engage in legal proceedings (on the one hand) and the chilling effect on parties bringing or defending claims if the unsuccessful party has to bear too heavy a costs burden (on the other). This level of indemnification assumes no misconduct by either party in the conduct of the litigation.
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> ... All we say is that the level of indemnification must be both meaningful and reasonable. The court's discretion to move up or down from that level having regard to the factors set forth in Rule 10.33 or in Rule 10.2(1) remains intact. Also, the level of indemnification may be higher or lower than the 40-50% depending on how the litigation was conducted and other factors not necessarily having anything to do with the conduct of the litigation.

[66] SRL seeks costs in the 40-50% range and submits that 50% of its reasonable and proper costs is the appropriate percentage to be applied.

[67] CNRL submits that SRL's claim for costs is profoundly disproportionate to the judgment amount of $10,772,949.

Proportionality

[68] Proportionality is not a mathematical equation that can be applied to every case; rather it is contextual, and all the factors considered under Rule 10.33 must also be assessed in the analysis. Not all litigation is created, or pursued, equally.

[69] In ***Barkwell***, at para 57, emphasis in the original, the Court of Appeal commented on proportionality:

> The overriding issue is proportionality. The rules on costs aim to balance indemnity of the winner without unreasonably discouraging access to the court, or unduly penalizing the losing party: ***McAllister*** at para 45. The winning party cannot simply claim a percentage of the fees paid if they are disproportionate to the issues and the amounts involved. Success is not a justification for

> disproportionate litigation. One important feature of the tariff in Schedule C is that it does not measure how much in fees was paid by the winning party, but rather, gives a rough measure of how much should have been incurred in the ordinary case having regard to the amounts in dispute. Obviously, the amount involved is not always determinative, but the principle of proportionality applies to non-monetary issues as well.

[70] For the reasons I have already set out, Schedule C does not provide an appropriate measure for the costs in this case because Schedule C does not provide a rough measure of the quantum of costs that should have been incurred. Complex, document-intensive commercial litigation, with numerous experts, is often beyond the scope of Schedule C. While there may be cases where costs calculated on Schedule C, or a multiple of Schedule C, may be appropriate, I find that this is not one of them.

[71] In a subsequent decision, ***Barkwell v McDonald***, 2023 ABCA 183, at paras 74-75, the Court of Appeal again discussed the issue of proportionality in a costs award:

> As noted, the reasons on trial costs ... awarded the respondent 50% of solicitor and client costs, relying on ***McAllister*** ... As indicated in the appeal reasons, an award of party and party costs based on solicitor and client costs must be justified ... The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The amount actually charged to the client is not definitive. The rates and amount of time invested must be justified. The costs awarded must be proportionate to the amounts in issue.
>
> This dispute ended up in a seven day trial, following many years of acrimonious litigation. Both parties took positions that were not supported by the ultimate outcome. Simply put, the amount of litigation was disproportionate to the issues, and both parties incurred excessive solicitor and client costs. This is not an appropriate file in which one party should be entitled to recover from the other party assessable costs based on a percentage of solicitor and client costs.

[72] CNRL relies on the decision of Woolley J (as she then was) in ***Remington Development Corporation v Canadian Pacific Railway Company***, 2023 ABKB 591, at paras 63-64, to demonstrate that the fees claimed by SRL are disproportionate to the amount awarded:

> The factors in Rules 10.2 and 10.33, discussed earlier, support Remington receiving 50% of its legal fees in a costs award. The size of the judgment relative to the fees incurred, the complexity of the issues, Remington's success in its claim and the importance of the case to Remington all support an award at the higher end. Fifty percent of Remington's reasonable and proper legal fees is an appropriate and proportionate indemnification.
>
> 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.

[73] Not accounting for any increase that could be awarded under Rule 4.29 based on the Formal Offer, discussed below, SRL seeks 50% of its costs (which it now acknowledges must be demonstrated to be reasonable and proper) which would result in a recovery of a significant

proportion of the judgment of $10,772,949. Based on the actual costs incurred by SRL, the costs at 50% would be approximately 42% of the judgment of $10,772,949, or 55% when disbursements are included.

[74] Clearly, SRL's judgment of $10,772,949 is far less than the plaintiff's recovery of $165,166,431 in ***Remington***. However, as noted, proportionality of a costs award is not a matter of applying a mathematical equation; I must apply all the Rule 10.33 factors when considering proportionality.

[75] In ***Remington***, the plaintiff expended less on legal fees, and more on expert fees, than SRL and recovered a far larger monetary judgment. But that does not mean that complex commercial litigation, where recovery will never be a very large sum, cannot be pursued. What is important is whether the amount claim in each case is proportional to that specific case.

[76] CNRL also noted that its actual legal costs were approximately 43% of SRL's actual legal costs.

[77] To the extent that SRL's actual legal fees are not reasonable and proper, then the Review Officer will make that determination and a lesser amount will be set. For the purposes of proportionality only, I will assume that the amount claimed by SRL is what will be found to be reasonable and proper by the Review Officer as it is the maximum amount that may be proven to be reasonable and proper.

[78] In ***Remington***, at para 69, Woolley J noted the success of the plaintiff:

> Similarly, while the Court rejected Remington's claim of punitive damages, it did so because the conduct of the Defendants did not meet the legal requirement of being a marked departure from ordinary standards of decent behaviour. Remington largely substantiated its factual claims about the Defendants' conduct ... Nor did the Court disagree with Remington's characterization of the Defendants' behaviour as problematic, describing the Defendants as not being "properly thoughtful about their own conduct or situation" and as "careless and self-centered"; the Court said that the Defendants did not think about Remington "one way or another, even when they should have. They acted unlawfully" ...

[79] There are some parallels between ***Remington*** and this case; I did not find the actions of CNRL to be such that harsh damages should be awarded, but I did find, at para 889 of the Decision, that CNRL's actions resulted in negligent trespass:

> I find that CNRL did not commit inadvertent or deliberate trespass but did commit trespass resulting from negligence or indifference to the rights of the P&NG rights holder. Further, I find that damages should be calculated on a basis that takes into account that CNRL committed negligent trespass, which I referred to above, starting at paragraph [819], as negligent trespass damages.

Conclusion on the percentage of fees claimed

[80] This litigation was complex, document-intensive and highly scientific. SRL was almost completely successful, though damages for negligent trespass were awarded instead of the harsh damages that SRL had sought. On the other hand, I found that CNRL did not trespass accidentally or inadvertently, and that it was not possible that CNRL believed, in good faith, that

it had the right to produce the gas without adequately examining whether it was non-solution gas. I concluded that CNRL did not have a low degree of culpability: Decision at para 886.

[81] Considering all the Rule 10.33 factors, I am of the view that it would be appropriate and proportional to award SRL 45% of its reasonable and proper costs, which costs will be determined by the Review Officer.

Issue 5: What is the effect of the Formal Offer to Settle served on CNRL on April 12, 2019

[82] SRL submits that it served the Formal Offer on CNRL in the amount of $5,125,000, inclusive of interest, plus costs and disbursements and CNRL did not accept the Formal Offer before it expired.

[83] Rule 4.29(1) sets out the consequences of failure to accept a formal offer to settle where the plaintiff obtains a judgment more favourable than the offer. In that case, "the plaintiff is entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a) or 10.32 for all steps taken in relation to the action or claim after service of the offer, excluding disbursements".

[84] CNRL submits that the double-costs consequence under Rule 4.29(1) does not apply in all cases. That is correct, but it does apply to a percentage of reasonable and proper costs award under Rule 10.31(1)(a).

[85] CNRL has not shown that any of the exceptions to the double-costs award set out in Rule 4.29(4) apply in this case and I find that none apply.

[86] In ***1490703 Alberta Ltd v Chahal***, 2021 ABQB 853 at para 25, Malik J said:

> While ***McAllister*** does not address the consequences of formal offers to settle on the granting of costs on an indemnity basis, I see no reason as to why a special approach is warranted. If a proper measure of costs in the usual course is on a percentage indemnity basis of a parties' expenses, then a doubling of costs would simply mean a doubling of whatever the costs awarded on an indemnity basis would be.

[87] CNRL asserts that the Court in ***Chahal***, did not address the exceptions set out in Rule 4.29(4). I have addressed those exceptions in this case and found that no exception to Rule 4.29(1) applies. CNRL also points out that ***Chahal*** was a judgment on an appeal of an Applications Judge's decision to dismiss a summary judgment application and did not arise as a result of a full trial. While this is true, when applying Rule 4.29(1), the nature of the underlying application does not have the same weight as those cases dealing with the appropriate measure of damages.

[88] There are a number of reasons it is appropriate to double SRL's costs award after the service of the Formal Offer, which was not accepted and ultimately surpassed. Firstly, Rule 4.29(1) says that the plaintiff is "entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a)" and I have awarded costs under Rule 10.31(1)(a). Secondly, it is a fundamental principle of the *Rules of Court* that they are intended to be used "to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable": Rule 1.2(2)(c). To disallow the doubling in this case would be contrary to this fundamental principle. Lastly, an interpretation

disallowing double costs in the case of a percentage of reasonable and proper costs being awarded under Rule 10.31(1)(a) would be artificial because it would be theoretically possible to award a similar amount of costs, that would be subject to doubling, under Schedule C.

[89] I am of the view that it is not appropriate to revisit proportionality at this stage. Having determined that the costs award I have made is proportional, the doubling under Rule 4.29(1) applies to that award. Rule 4.29(1) might be seen as punitive, or it might be seen as a measure to drive the right behaviour – which is to make offers to settle and consider them seriously in the context of the whole litigation. Whichever way Rule 4.29(1) is seen, its objective is to provide financial consequences to the party failing to accept an offer to settle and it is not part of the proportionality assessment.

Conclusion

[90] Pursuant to Rule 10.31(1)(a), SRL is entitled to 45% of its reasonable and proper costs, plus a doubling of costs under Rule 4.29(1), plus disbursements in the amount of $1,461,448.08.

[91] Given that CNRL did not object to SRL's disbursements, they will not be part of the Review Officer's mandate, which will be focused on determining SRL's reasonable and proper costs, excluding disbursements:

(a) from the commencement of the action to April 12, 2019 (date of service of the Formal Offer); and

(b) from April 13, 2019 to the conclusion of the trial, including this Cost Application, but not including the appeal.

[92] A Review Officer's authority is set out in Rule 10.17. In addition, under Rule 10.18, a Review Officer may refer any question arising about a lawyer's charges to the Court for a decision or direction. In the event that the Review Officer dealing with this matter believes that a decision of, or direction from, this Court is required, then the Review Officer may avail themselves of the authority set out in Rule 10.18(1)(b) to bring that request for a decision or direction to my attention.

[93] Once the reasonable and proper costs are determined, SRL shall calculate it costs award, which shall be the sum of:

(a) 45% of the reasonable and proper costs from commencement of the action to April 12, 2019; plus

(b) 45% of the reasonable and proper costs from April 13, 2019, to the conclusion of the trial, including this Cost Application, but not including the appeal, which amount shall then be doubled in accordance with Rule 4.29(1); plus

(c) disbursements in the amount of $1,461,448.08.

[94] SRL shall prepare the appropriate order and, after obtaining CNRL's agreement as to form and content, submit it to me for endorsement.

Heard on the 29th day of January, 2024.
Dated at the City of Calgary, Alberta this 29th day of February, 2024.

E.J. Sidnell
J.C.K.B.A.

Appearances:

David T. Madsen KC and Bradon Willms
for the Plaintiff

G. Scott Watson and Shannon Kelley
for the Defendant

Appendix A - Selected rules from the *Alberta Rules of Court* AR 124/2010

Rule 4.29(1)

(1) Subject to subrule (4), if a plaintiff makes a formal offer to settle that is not accepted and subsequently obtains a judgment or order in the action that is equal to or more favourable to the plaintiff than the offer, the plaintiff is entitled to double the costs to which the plaintiff would otherwise have been entitled under rule 10.31(1)(a) or 10.32 for all steps taken in relation to the action or claim after service of the offer, excluding disbursements.

. . .

(4) This rule does not apply

(a) if costs are awarded under rule 10.31(1)(b),

(b) in the case of a formal offer to settle made with respect to a streamlined trial, if the offer is made less than 10 days before the date scheduled to hear the streamlined trial,

(c) in the case of a formal offer to settle made with respect to any other matter, if the offer is made less than 10 days before the date scheduled for the trial to start,

(d) in the case of a formal offer to settle that is withdrawn in accordance with rule 4.24(4), or

(e) if in special circumstances the Court orders that this rule is not to apply.

Rule 10.2(1)

(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

(a) the nature, importance and urgency of the matter,

(b) the client's circumstances,

(c) the trust, estate or fund, if any, out of which the lawyer's charges are to be paid,

(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.

Rule 10.29(1)

(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2) [dealing with applications or proceedings heard without notice]

Rule 10.30(1)

(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

...

(c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

Rule 10.31(1)(2) and (3)

(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

(a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or

(b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
  (i) an indemnity to a party for that party's lawyer's charges, or
  (ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

(a) include the reasonable and proper costs that a party incurred to bring an action;

(b) unless the Court otherwise orders, include costs incurred by a party
  (i) in an assessment of costs before the Court, or
  (ii) in an assessment of costs before an assessment officer;

(c) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;

(d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a streamlined trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

(a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

(b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;

(c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;

(d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

...

Rule 10.33

(1) In making a costs award, the Court may consider all or any of the following:

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

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(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.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct;

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

Rule 10.34(1)

(1) The Court may order an assessment of costs by an assessment officer and may give directions to the assessment officer about the assessment.

Rule 10.35(1)

(1) A party entitled to payment of costs must prepare a bill of costs in Form 44

(a) if that party wishes or is required to have the costs assessed by an assessment officer, or

(b) on request of a party who is required to pay the costs.

(2) The bill of costs must

(a) itemize all the costs sought to be recovered, distinguishing between fees, disbursements and other charges, and

(b) be signed by the person responsible for its preparation.

Rule 10.38(1)

(1) For the purpose of assessing costs payable, an assessment officer may do all or any of the following:

(a) take evidence either by affidavit or orally under oath, or both;

(b) direct the production of records;

...

(f) require details of the services provided and disbursements or other charges claimed or require information about any other matter necessary to understand the reason for an item in the bill of costs and to decide whether the item and charge is reasonable and proper;

...

Rule 10.39

(1) An assessment officer may direct any question arising about the assessment of costs payable to be referred to the Court for a decision or direction.

(2) The assessment officer may do all or any of the following:

(a) require one party to serve another party or other interested person with notice of the reference;

(b) specify how a reference to the Court is to be prepared and by whom;

(c) prescribe time limits;

(d) specify any other matter for the effective and efficient disposition of the reference.

(3) On considering a question referred to it, the Court may make any order it considers appropriate in the circumstances, including an order to enforce a direction given under rule 10.38.

Rule 10.41(1)

(1) Subject to an order, if any, an assessment officer may, with respect to an assessment of costs payable, determine whether the costs that a party incurred to

(a) file an application,

(b) take proceedings,

(c) carry on an action, or

(d) participate in an action, application or proceeding,

are reasonable and proper costs.

(2) Reasonable and proper costs of a party under subrule (1)

(a) include the reasonable and proper costs that a party incurred to bring an action,

(b) unless the Court otherwise orders, include costs that a party incurred in an assessment of costs before the Court,

(c) unless the Court or an assessment officer otherwise directs, include costs that a party incurred in an assessment of costs before an assessment officer,

(d) do not include costs related to a dispute resolution process described in rule 4.16 or a judicial dispute resolution process under an arrangement described in rule 4.18 unless a party engages in serious misconduct in the course of the dispute resolution process or the judicial dispute resolution process, and

(e) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry, or the fees and other charges of an expert for assisting in the conduct of a streamlined trial or a trial.

(3) In making an assessment under subrule (1) and taking into account the conduct of the parties, the assessment officer

(a) may decide whether an item in the bill of costs is reasonably and properly incurred,

(b) may disallow an item in a bill of costs that is improper, unnecessary, excessive or a mistake,

(c) may fix the amount recoverable for services performed by a lawyer that are not specified or described in Schedule C,

(d) may not allow lawyer's fees at more than the amounts specified in Schedule C except when these rules, including the Schedule, explicitly permit or a written agreement expressly provides for a different basis for recovery,

(e) may not reduce an amount provided for in Schedule C

(i) unless Schedule C so permits, or

(ii) except in exceptional circumstances,

and

(f) may, in exceptional circumstances, reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited.

(4) If the assessment officer disallows or reduces a fee specified in Schedule C, the assessment officer must give reasons for doing so.

...