Date: 20241004
Docket: CI 16-01-01948
CI 16-01-00868
CI 16-01-01986
(Winnipeg Centre)
Indexed as: Campbell et al. v. Brar et al.
Cited as: 2024 MBKB 149

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CI 16-01-01948	)	Rick Handlon
	)	Eric Blouw
ROB CAMPBELL,	)	for Rob Campbell
plaintiff,	)	
	)	
- and -	)	Richard Olschewski
	)	Abhishek Makam
RICKVINDER BRAR, 5174245 MANITOBA LTD. and SATNAM BRAR,	)	for Rickvinder Brar
	)	
defendants,	)	Faron Trippier
	)	Irina Vakurova
AND BETWEEN:	)	for Satnam Brar,
CI 16-01-00868	)	5174245 Manitoba Ltd. and
	)	Tartan Towing
RICKVINDER BRAR,	)	
	)	
plaintiff,	)	Judgment Delivered:
	)	October 4, 2024
- and -	)	
	)	
ROB CAMPBELL, SATNAM BRAR and 5174245 MANITOBA LTD., CARRYING ON BUSINESS AS TARTAN TOWING, AND THE SAID TARTAN TOWING,	)	
	)	
defendants,	)	

AND BETWEEN: CI 16-01-01986 SATNAM BRAR, plaintiff, - and - RICKVINDER BRAR, 5174245 MANITOBA LTD., AND ROB CAMPBELL, defendants.	)))))))))))

EDMOND JA (ex officio JKB)

INTRODUCTION AND BACKGROUND

[1] This is the second of two decisions dealing with the motion of Rickvinder Brar (Rick) seeking leave to have the court reconsider a decision on costs released May 25, 2023 (the cost decision).

[2] This litigation has a long history. The first notice of application seeking relief pursuant to the oppression remedies in ***The Corporations Act***, C.C.S.M. c. C225, was filed in March 2016. Numerous motions were filed during the litigation dealing with a multitude of issues and it is unnecessary to list all of the steps taken prior to trial. In March 2018, a consent order was filed which permitted three separate applications/actions commenced by the parties to be tried together. All the proceedings involve claims which relate to the conduct and actions of the directors and shareholders of 5174245 Manitoba Ltd. (517). 517 carries on business as Tartan Towing, which has been a successful towing company in the City of Winnipeg for many years.

[3] The trial of the applications/actions proceeded during two separate time frames and lasted approximately seventeen days. On November 30, 2022, I delivered reasons for decision (2022 MBKB 225) (trial decision). The same definitions of persons and entities used in the trial decision will be used in this decision.

[4] In the trial decision, I stated that if the parties could not agree on costs, they could schedule a hearing to have costs determined. The parties first appeared before me on March 10, 2023, for the purpose of scheduling a date or dates to hear submissions on costs and to set timelines for filing briefs. I set two days, May 9 and 10, 2023, commencing at 9:00 a.m., for one hour each day to ensure that there was sufficient time to hear submissions and adjudicate the outstanding cost issues. The disposition sheet states that all parties were to file initial briefs with attached bills of costs by March 31, 2023, and that responding briefs and cases relevant to the issue of costs were to be filed on or before April 28, 2023. Each of the parties' briefs were reviewed by me in advance of the hearing which commenced on May 9, 2023.

[5] Rob and Sid filed briefs on March 31, 2023, submitting the court should award costs in their favour on a solicitor and client basis, or alternatively, on an elevated cost basis. They made detailed submissions submitting that they were primarily successful and Rick's unproven allegations of undue influence, duress and misconduct against Rob and Sid, together with Rick's inappropriate conduct during the litigation, justified an award of solicitor and client costs. I do not propose to list the various submissions advanced by counsel for Sid and Rob. The submissions are outlined in Rob's motion brief at para. 20 and summarized in the cost decision at para. 7.

[6] Rick's first brief was filed on April 3, 2023. The primary submissions advanced on behalf of Rick were that costs should not be determined until the conclusion of the second part of the trial dealing with quantum of damages, and that if costs were determined in May 2023, he was the successful party and the court should award costs to Rick and against Rob and Sid. In his brief, Rick referenced the factors to be considered by the court in exercising its discretion to award costs pursuant to Court of King's Bench Rule 57.01(1) (see paras. 7-35 of Rick's brief). Counsel for Rick also filed a reply brief on May 2, 2023.

[7] The costs hearing commenced on May 9, 2023, and was completed on that day. Counsel for Rick responded to the submissions advanced on behalf of Rob and Sid. Since counsel for Rob and Sid spent more than half of the first hour making their submissions, counsel for Rick was asked if he required more time on the second day to complete his submission. The submissions on behalf of Rick were completed and counsel advised the court that the second day was not required. After the hearing, I reserved my decision.

[8] On May 25, 2023, I issued the cost decision which outlines the various factors I considered in accordance with the King's Bench Rules in exercising my discretion to award costs. I provided reasons for awarding costs against Rick and in favour of Rob and Sid. I did not award solicitor and client costs respecting all steps in the proceedings. I concluded as follows:

> [19] Costs were previously ordered in the amount of $5,000 payable by Rick to each of Rob and Sid respecting Rick's motion seeking amendments to the statement of claim. That order has already been granted and was not disturbed by the decision or by this cost endorsement.

> [20] In my view, it is also appropriate to order solicitor and client costs payable by Rick to each of Rob and Sid respecting the motion to adjourn the trial which was granted on November 12, 2019, and as requested, 50% of Rob's and Sid's thrown away solicitor and client trial preparation costs incurred between November 7, 2019 and November 12, 2019, the date of the trial adjournment. Solicitor and client costs are also awarded against Rick and in favour of Sid and Rob respecting the examinations for discovery that were conducted following the order granting leave to amend the statement of claim. The examinations for discovery were necessary due to the new allegations made in the amended statement of claim and in light of the findings at trial, should not have been required.
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> [21] Considering the mixed success of the parties, all other costs claimed in connection with preparing for the trial and attending the trial are awarded against Rick and in favour of Sid and Rob on a party and party basis under the Court of King's Bench Tariff, calculated as a Class 4 proceeding.

[9] In June 2023, shortly after the release of the cost decision, revised bills of cost of Rob and Sid, respectively, were sent to counsel for Rick together with a draft form of judgment.

[10] There were delays in receiving a response from counsel for Rick, and in late July 2023, Rick's counsel, Mr. Olson, advised by email that he had some concerns with certain items in the draft bills of costs.

[11] There were negotiations regarding the bills of costs and counsel for Sid and Rob take the position that an agreement was reached to resolve the bills of costs. In accordance with my previous decision delivered May 28, 2024, a new Court of King's Bench justice will hear the motion seeking to enforce the terms of an alleged accepted offer regarding the bills of costs.

[12] In my previous decision delivered May 28, 2024, I summarized what occurred on or after March 1, 2024 as follows:

> [10] An affidavit of Elenore Kesterke sworn March 1, 2024, and a motion brief were filed on behalf of Rob. On March 12, 2024, an affidavit of Charlene Hartly sworn March 12, 2024, and a supplemental brief of Rick (the supplemental brief)

were filed respecting the scheduled hearing date of March 15, 2024 at 9:00 a.m. In essence, Rick submits that the court has jurisdiction to re-open the question of costs, vary the prior cost decision and that I should exercise my discretion to do so. Rick submits that opposing counsel provided the court with inaccurate submissions at the costs hearing concerning the following issues:

(a) The reason for and necessity of the adjournment of the trial;

(b) The extent of the examinations for discovery conducted after Rick's statement of claim was amended;

(c) The affidavit filed in support of the Motion Seeking Leave to Amend the Statement of Claim was a false affidavit;

(d) Rick advanced an unnecessary, improper and vexatious claim;

(e) Only Rick's conduct contributed to and had the effect of complicating, delaying and lengthening the litigation.

[11] At paragraph 42 of the supplemental brief, Rick admits that the alleged inaccurate submissions should have been challenged at the costs hearing and acknowledges that detailed submissions were not made at that time.

[12] After reviewing the supplemental brief, I had concerns about the jurisdiction or authority of the court to re-open, amend or vary the previous order as to costs made in May 2023. The registrar of the Court of Appeal advised all counsel by e-mail that they were instructed to file briefs by March 15, 2024, dealing with that threshold issue and any other issue they determined may be required. The hearing was adjourned from March 15, 2024 to March 20, 2024, to permit the parties to file their briefs and address the new issues raised in the supplemental brief.

[13] Further briefs were filed on March 15, 2024. On March 18, 2024, a further brief was filed on behalf of Rick which is entitled Supplemental Brief of Rickvinder Brar Threshold Issue (threshold issue brief).

[14] The threshold issue brief raises the question as to whether I have jurisdiction, as a Court of Appeal judge, to further adjudicate on matters that have been raised by the parties. The three matters and the jurisdiction to decide them are described by Rick as follows:

(a) The further adjudication of costs regarding the endorsement that I issued regarding costs;

(b) A reconsideration motion; and

(c) The issue of whether there was an enforceable agreement on costs.

> [15] On March 20, 2024, a hearing proceeded before me in my capacity as a Court of King's Bench justice. I directed counsel to address the threshold issue of jurisdiction first. That is, as a justice of the Court of Appeal whether I had jurisdiction to sit as an ex officio Court of King's Bench justice and decide the three matters raised.

[13] On March 20, 2024, Rick filed a notice of motion seeking, among other things, an order granting a reconsideration of the cost decision on the merits of the case. He relies on a "reconsideration brief" filed March 20, 2024 (reconsideration brief). Rick describes the purpose of the reconsideration brief as follows (p. 11):

(1) to bring the inaccurate submissions from the costs hearing to the court's attention;

(2) seek leave from the court to reconsider the costs decision given the inaccurate submissions; and

(3) seek a stay of the costs decision pending appeal.

[14] On May 28, 2024, I delivered my reasons for decision on the jurisdiction to sit as an ex officio Court of King's Bench justice.

[15] Since May 28, 2024, the following affidavits and motion briefs relevant to the issue of re-opening the issue of costs have been filed:

(1) Affidavit of Charlene Enns, affirmed September 9, 2024;

(2) Motion Brief of Rob Campbell, filed September 9, 2024;

(3) Supplemental Reconsideration Motion Brief of Rick, filed September 10, 2024;

(4) Reply Brief of Rick, filed September 13, 2024.

ISSUES

[16] A review of the briefs that have been filed by the parties raises the following issues for determination:

(1) Should the court grant leave to re-open the issue of costs and reconsider the costs decision?

(2) Should the court grant a stay of the costs decision pending release of the decision from the Court of Appeal?

LAW

[17] Even though the cost decision is dated May 25, 2023, the order made was not entered pursuant to King's Bench Rule 59. Therefore, the court is not *functus officio* and the parties agree that the court retains jurisdiction to revisit its decision before a formal judgment or order is entered (see ***Canadian Broadcasting Corp. v. Manitoba***, 2021 SCC 33; ***Ridout v Ridout***, 2003 MBCA 61). In my decision delivered May 28, 2024, I stated as follows:

> [12] After reviewing the supplemental brief, I had concerns about the jurisdiction or authority of the court to re-open, amend or vary the previous order as to costs made in May 2023. The registrar of the Court of Appeal advised all counsel by e-mail that they were instructed to file briefs by March 15, 2024, dealing with that threshold issue and any other issue they determined may be required. The hearing was adjourned from March 15, 2024 to March 20, 2024, to permit the parties to file their briefs and address the new issues raised in the supplemental brief.

[18] The issue I instructed the parties to address was the jurisdiction of the court to re-open, amend or vary a previous order as to costs. My decision delivered on May 28, 2024, addressed the jurisdiction of a judge of the Court of Appeal hearing ongoing

disputes arising from a decision delivered by the judge while a justice of the Court of King's Bench.

[19] The issue of re-opening, amending or varying a previous order was addressed in ***Abraham v Wingate Properties Limited***, 1985 CarswellMan 232 (Man. C.A.), 37 Man. R. (2d) 267. In that case, the Court of Appeal released written reasons for judgment and the appellant applied by a notice of motion for a reconsideration of certain issues of the judgment prior to the certificate of decision being taken out or entered. The Court of Appeal stated the applicable test as follows:

> 1. … No certificate of decision has been taken out or entered and, in consequence, there is jurisdiction for this court to entertain the motion. Notwithstanding, this court will not in the ordinary course grant an application for reconsideration unless there is a patent error on the face of the reasons delivered or a point for argument not raised at the hearing of the appeal and which arises out of the judgment delivered, which point could not reasonably have been foreseen and dealt with at the original hearing.

[20] In ***Abraham***, the Court of Appeal did not accept as the basis for calculating damages the approach adopted by the trial judge nor that argued by the parties. Since the Court of Appeal adopted its own approach and may not have taken all relevant factors into consideration, the court was prepared, on the limited issue identified, to reconsider its decision.

[21] The parties submitted that the guiding principles governing when a court is asked to exercise its discretion to reconsider its own decision are referenced in ***Chase Industries Ltd. v. Vermette et al.***, 2004 MBQB 152 (***Chase***). Justice Scurfield delivered oral reasons granting summary judgment to the plaintiff on the basis of evidence filed by the plaintiff. When the summary judgment motion was heard, the

defendants had not filed any affidavits to support their defence to the claim. At the hearing, counsel for the defendants requested an adjournment and other orders. The adjournment was not granted. Following the reasons for decision, the defendants filed a motion asking the court to admit an affidavit responding to the plaintiff's material and to set aside the decision. In the affidavit, the representative of the corporate defendant set out a substantive basis for the defence and a counterclaim. The motion judge concluded that he had "no hesitation in concluding that if the affidavit had been before me when the first motion was argued, I would not have granted summary judgment to the plaintiff" (*ibid* at para. 3).

[22] In ***Chase***, the court reviewed the standards for re-opening a decision. He cited the general principle that the court has jurisdiction to change a decision and re-open a case before a judgment has been entered or an order has been signed (see ***Munroe v. Heubach***, 1908 CanLII 297 MBKB; and ***Ridout***).

[23] In ***Chase***, the motion judge cited with approval ***Sykes v. Sykes***, 1995 CanLII 2387 (BCCA), which commented on the jurisdiction of a court to re-open a case and stated as follows:

> [6] In *Sykes v. Sykes* (1995), 1995 CanLII 2387 (BC CA), 6 B.C.L.R. (3d) 296 (C.A.), Wood J.A. commented on this jurisdiction, at p. 300:
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> > … It is well established that the discretion which a trial judge has to re-open before formal judgment has been entered is what is called "an unfettered discretion", although it is one which for obvious reasons must be exercised sparingly. The following quotation from the judgment of Mr. Justice Macdonald in *Clayton v. British American Securities Ltd.*, 1934 CanLII 229 (BC CA), [1934] 3 W.W.R. 257 at 295 (B.C. C.A.), still represents the law in this Province:

> It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's process would likely result.
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> In my view, new evidence is not an essential prerequisite to a trial judge's exercise of the discretion to re-open. In some cases, it may be the only circumstance which would justify a re-opening. Indeed it may be that in many cases a re-opening would only be justified on the basis of new evidence which was not available at the time of the original trial. It will in all cases depend on the circumstances…

[24] Justice Scurfield permitted the defendants to file a substantive affidavit and to re-open the case. He concluded as follows:

> [21] However, the failure to file a substantive affidavit prior to the delivery of a summary judgment should not function as an absolute bar to the admission of new evidence if an acceptable explanation is offered and the order has not yet been signed. If the court admits new evidence at this stage, the court must be satisfied that the new evidence:
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> (a) has the appearance of credibility,
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> (b) establishes a genuine issue to be tried,
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> (c) is presented in good faith,
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> (d) contains material facts that could not have been provided by reasonable diligence prior to the scheduled motion, and
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> (e) establishes that the balance of prejudice favours the admission of the new evidence.
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> If these standards are met, then the court is entitled to exercise its discretion in a judicial fashion and reopen the hearing.

[25] Two other cases were cited by Rick as authority for the court to exercise its discretion to reconsider the cost decision and allow further submissions to be made. In ***Victoria General Hospital v General Accident Assurance Co. of Canada***,

[1996] M.J. No. 142 (***V G Hospital***) the motion judge granted an application against the insurer, General Accident Assurance, ordering it to defend Victoria General Hospital in a claim brought by Cook against Victoria General Hospital and Hill in another action in the Court of (then) Queen's Bench. Subsequent to the delivery of reasons for decision, the Cook action was settled, and Victoria General Hospital sought an order against General Accident for full indemnification of the costs in defending the Cook action incurred prior to the court's decision requiring General Accident to defend. The court was satisfied that it had jurisdiction to reconsider the cost issues as the former order had not been signed and filed. The motion judge was also satisfied that it was just to do so.

[26] In ***Hongkong Bank of Canada v. Philips***, [1997] M.J. No. 319, the motion judge considered a motion for reconsideration and variation of the judgment as it related to costs. In that case, the court made a disposition of costs without first hearing detailed and final submissions from counsel on the issue. The court was satisfied that it should reconsider the original decision on the basis that the time required by counsel to properly defend the claim and prosecute third party proceedings were much greater than originally suspected. As a result, the court reconsidered the issue of costs. In the unique circumstances of that case, the motion judge concluded that it was appropriate to reconsider the costs order.

[27] A more recent decision which considered a motion to re-open a case following summary judgment is ***Ostrowski v. Weinstein et. al.,*** 2022 MBKB 227. Justice Greenberg provided a good summary of the law applying to circumstances where a party is seeking to re-open the case to advance a new argument. She stated:

[9] As I said, the plaintiff on this motion to re-open is not seeking to introduce new evidence. Rather he is seeking to advance a new legal argument. So decisions of our Court of Appeal as to when it is appropriate to re-open an appeal are apt. Those decisions make it clear that a re-hearing will be granted only in exceptional circumstances where the interests of justice manifestly require it.

In ***Willman v. Ducks Unlimited (Canada),*** 2005 MBCA 13 (CanLII) (***Willman***), Freedman J.A. provided some examples of such circumstances (at para. 10):

1) [where] there is a patent error on a material point on the face of the reasons;

2) [where] the appeal was decided on a point of law that counsel had no opportunity to address, and which point could not have reasonably been foreseen and dealt with at the hearing; or

3) [where] the court has clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice.

[10] ***Willman*** was followed in ***Samborski Garden Supplies Ltd. v. MacDonald (Rural Municipality)***, 2015 MBCA 53 (CanLII), where the court noted (at para. 23) that the standard for establishing that refusing a re-hearing would lead to a miscarriage of justice is significant. The court dismissed Samborski's request for a re-hearing, stating:

> [24] We have not been persuaded that the appellate proceedings have unfolded in such a way that a procedural error has occurred, let alone that there is consequential risk of a miscarriage of justice unless a rehearing of the appeal is granted. A party should fully develop and put forward its best and strongest case at the hearing of the appeal, not after the appeal is decided. The dismissal of the appeal was not the time for the applicant to begin to look for further evidence to support its case. The parties received notice of the court's concern about the conditional use order having been discontinued under the Act in light of the record before the application judge and each counsel addressed that concern as they saw fit. A motion for a rehearing is not an opportunity, with the benefit of hindsight, to revisit the conduct of an appeal by experienced counsel (see *Compton Argo Inc.* at para. 3). To allow a rehearing in such circumstances would too quickly sacrifice the important principle of finality in litigation which is central to the proper administration of justice.
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> [emphasis added]

...

[13] More recently, in ***Christie Building Holding Company v. Shelter Canadian Properties Limited***, 2021 MBQB 101 (CanLII), Joyal C.J.Q.B. refused to re-open a motion regarding the record in an arbitration appeal, saying:

> [50] The jurisprudence is clear that the court's discretion to reopen a hearing once a decision has been rendered must be exercised sparingly and with the greatest of care. There is indeed a strong interest in finality to litigation. That objective should only be departed from in exceptional circumstances. A court should be extremely cautious and reluctant to reopen a hearing without a rigorous consideration of the legal criteria for doing so and without the necessary supportive evidence.

[14] Joyal C.J.Q.B. cited, with approval, the comments of the Alberta Court of Appeal in ***Alberta (Child, Youth and Family Enhancement, Director) v. B.M.***, 2009 ABCA 258 (CanLII), where that court said:

> [11] ... [T]he Courts should be very sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back...

ANALYSIS AND DECISION

[28] Applying these principles to the facts and circumstances of this case, I am not satisfied that Rick has met the criteria to re-open the issue of costs and reconsider the cost decision. The submissions on costs were filed in advance of the cost hearing and the cost issues were decided in the cost decision. Rick had an opportunity to file a detailed brief responding to the positions advanced by Rob and Sid and chose not to do so. Rick acknowledged that he failed to file a detailed brief and raise the submissions made in the reconsideration brief and other briefs prior to the costs hearing and offered no reasonable explanation for failing to do so.

[29] Rick has not identified a patent error on the face of the reasons delivered in the cost decision or a point for argument not raised at the costs hearing which point could not reasonably have been foreseen or dealt with at the original hearing.

[30] Further, I am not satisfied that there is another ground or basis to re-open the cost issues and reconsider further submissions at this stage. There is no basis to conclude I clearly overlooked or misapprehended the evidence or the law in a significant respect and there is a consequential serious risk of miscarriage of justice. In my view, Rick's new arguments can be characterized as changing tactics in response to an adverse decision on costs. Rick should have put forward his best and strongest case at the costs hearing. Allowing the re-opening of the case would sacrifice the important principle of finality in litigation which is central to the proper administration of justice.

[31] The key to the admission of the new evidence in the ***Chase*** case was the fact that there was an acceptable explanation provided prior to the order being signed and the court was satisfied that the new evidence met the criteria outlined.

[32] In my view, this case is distinguishable from the facts in ***Chase*** and Rick's submission does not satisfy the criteria to be considered and applied to re-open the cost decision. I am not satisfied the new submissions have been presented in good faith and they clearly do not meet the criteria that the submissions could not have been provided with the exercise of reasonable diligence prior to the scheduled motion on May 9, 2023. As well, I am not satisfied that the balance of prejudice favors the admission of the new submissions. Granting leave to allow new submissions at this stage would be unfair and inconsistent with the previous directions provided to the parties at the case conference on March 10, 2023.

[33] In the reconsideration brief, Rick's counsel acknowledged that they failed to properly prepare for the costs submission scheduled for May 9, 2023, and admitted that the alleged "inaccurate submissions" should have been challenged at the costs hearing. Rick states in the reconsideration brief:

> 4. While it is acknowledged that Rick's counsel failed to properly prepare a cost submission scheduled for May 9, 2023 (the "Costs Hearing") and assumed that this court would defer costs to the end of the second bifurcated trial, this assumption was based, in part, on Opposing Counsel's many unsuccessful attempts to thwart Rick's claim for his shares including four unsuccessful Security for Costs attempts.
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> …..
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> 42. … Rick contends that detailed and final submissions were not made by Rick's counsel at the Costs hearing for three reasons: (a) Rick's counsel believed that the Costs hearing was just another delay tactic to hamper Rick in the preparation of the appeal; (b) Ricks' Counsel believed that the Court would not have been deceived by Rob's and Sid's outlandish submissions; and (c) the Costs Hearing was rushed.

[34] In my view, the explanations given are insufficient to justify exercising my judicial discretion to re-open the case. Counsel for Rob and Sid filed detailed briefs on March 31, 2023, outlining the basis for seeking costs on a solicitor and client basis. Counsel for Rick had sufficient time to respond prior to the costs hearing on May 9, 2023, and there is no basis or foundation to accept the submission that the costs hearing was a delay tactic to hamper Rick's preparation of the appeal. The costs hearing was a scheduled hearing date set at a case conference where the time to file material was set so the costs hearing could proceed fairly with briefs from all parties and without further delay.

[35] The second explanation offered by Rick is also rejected. If the submissions of Rob and Sid were "outlandish" or inaccurate, the time to respond was in the reply brief filed prior to the costs hearing, not a year later.

[36] Finally, the third reason submitted by Rick that the costs hearing was rushed is not correct. While I agree Rick's counsel had a short time to make his submission on May 9, 2023, he was asked if he required the second day and he replied he did not. He stated unless the court had questions that his submission was complete.

[37] It is important to put the reconsideration request in proper perspective. None of the submissions advanced by Rick in the reconsideration brief and supplemental briefs filed after the cost decision raise new evidence that could not have been provided by the exercise of reasonable diligence prior to the scheduled motion. I agree that the submissions now being advanced are more detailed and more complete responses to the positions advanced by Sid and Rob, but the explanations provided do not satisfy me that the new submissions meet the exceptional circumstances required to re-open the case. The submissions now being advanced could have been provided prior to the scheduled costs hearing. A motion to re-open the case is not an opportunity with the benefit of hindsight to revisit arguments made by experienced counsel. As emphasized in the cases, the discretion to re-open a case should be exercised sparingly and carefully to avoid abuse of the court's process.

[38] Further, I am not satisfied that ***V G Hospital*** or the ***Hongkong Bank*** cases assist Rick in this case.

[39] In ***V G Hospital***, the motion judge recognized that new facts had arisen since the original decision on costs. Counsel acknowledged a new set of facts justified a reconsideration of the motion judge's initial costs decision. As well, the initial costs decision was not fixed and finalized, it was contingent on the future result of the related legal proceeding.

[40] In ***Hongkong Bank***, the motion judge recognized that he had erred in issuing his decision as to costs without first hearing detailed and final submissions from counsel on an issue having regard to his conclusion and the judgment that was delivered.

[41] Most of the cases relied upon by the parties involved new evidence that was not available at the time of the original hearing. The present case is distinguishable because it is not new evidence that Rick is seeking to rely upon. His position is based on new arguments or submissions in response to the submissions advanced in briefs filed by Rob and Sid prior to the costs hearing. Therefore, in my view, the principles summarized in ***Ostrowski*** apply in this case.

[42] Rick submits that he was required to order transcripts of the various hearings to support the submissions that were being advanced, and it was impractical to order the transcripts and have them all available for the costs hearing on May 9, 2023. In essence, Rick's submission is that he should be granted leave to present a more detailed and elaborate argument based on his assertion that the court was misled by an "inaccurate narrative" advanced by Rob and Sid and that the court was duped into making the cost decision.

[43] I disagree with the submission advanced by Rick. The findings made were based on the record before the court, the evidence filed, and the reasons for decision delivered on the liability issues raised in the proceedings.

[44] In addition to the factors referenced in the various decisions, one other factor that I considered is that the party affected by the cost decision must act with reasonable diligence in seeking leave to re-open the case. The bills of costs and order should have been filed with reasonable dispatch 30 to 60 days of the release of the cost decision on May 25, 2023. Rick's reconsideration brief and supplemental brief were not filed until March 2024, approximately one year after briefs were required to be filed for the costs hearing. The fact that the parties delayed in finalizing and filing the bills of costs or an order does not assist Rick to support that the court should exercise its discretion to reconsider new submissions. As stated earlier, the discretion to re-open or re-hear a matter must be exercised sparingly, carefully and in exceptional circumstances.

[45] Further, to apply the rationale stated in the ***Willman*** and ***Abraham*** cases, the point for argument not raised at the original hearing must be a point which could not reasonably have been foreseen and dealt with at the original hearing. In my view, the submissions advanced approximately one year after the deadline to file submissions are all points that could reasonably have been foreseen and dealt with at the original hearing.

[46] If the transcripts referenced by Rick were required, the court could have been alerted to the argument to be advanced at the costs hearing and if the transcripts were not available, a request for an adjournment could have been made until the transcripts were received.

[47] In the reply brief of Rickvinder Brar: consideration of costs filed September 13, 2024 (document no. 99), counsel for Rick responded to the issue of good faith and reasonable diligence. Rick submits that it would have taken 34 days just to receive the transcripts from the date they were ordered and, therefore, "acting diligently, reasonably and in good faith, Rick could not have obtained the necessary transcripts in the two months time to meet the deadline for the responding brief" (para. 19).

[48] The fact of the matter is the transcripts were not ordered prior to the costs hearing. Nor was the court advised that the transcripts were required in order to advance submissions at the costs hearing. In my view, the transcripts were not necessarily required to advance Rick's arguments outlined in the reconsideration brief. In any event, if the transcripts were required, the court ought to have been advised accordingly and steps could have been taken to file the transcripts in due course or request an adjournment to have the transcripts available at the hearing. Neither was done.

[49] This is not a case where new evidence became available subsequent to the costs hearing and there is a reasonable explanation for the evidence not being filed prior to the hearing. This is also not a case where there is a serious risk of a miscarriage of justice unless a re-hearing is granted. In my view, the position advanced by Rick amounts to an attempt to reargue the case based on new submissions, with the benefit of hindsight once the cost decision was delivered.

[50] After reviewing all of the evidence, I have determined that Rick has failed to meet the criteria required to re-open the cost decision. I am not satisfied it would be just to re-open and reconsider the cost decision. Receiving the further submissions, almost one

year after the deadline to file submissions has passed, amounts to an abuse of the court's process and is inconsistent with the important principle of finality of litigation.

[51] Accordingly, it is unnecessary for me to reconsider each of the new submissions advanced by Rick alleging opposing counsel provided the court with inaccurate submissions at the costs hearing. The determinations made at the costs hearing were made on the basis of a review of the various factors outlined in Court of King's Bench Rule 57.01(1) and a review of the court files and the steps taken by the parties during the course of the litigation.

[52] One further submission deserves comment. Rick advanced the position in his reply brief filed September 13, 2024 (document no. 99), that in the reasons for decision delivered May 28, 2024, dealing with the threshold issue, the court had already exercised its discretion to re-open the cost decision for reconsideration. That submission is incorrect. The sole issue determined in my reasons for decision delivered May 28, 2024, was to address the jurisdiction of a judge of the Court of Appeal hearing ongoing disputes arising from a decision delivered by the judge while a justice of the Court of King's Bench.

[53] The court deliberately postponed making any decision on the motion for reconsideration until the threshold issue dealing with the jurisdiction to hear the matter was decided.

[54] For the foregoing reasons, Rick's request that the court grant leave to re-open and reconsider the cost decision is denied.

[55] As the Court of Appeal released its reasons for decision on October 3, 2024, it is unnecessary to grant a stay of the cost decision.

[56] Costs respecting the reconsideration motion are awarded against Rick and in favour of Sid and Rob on a party and party basis under the Court of King's Bench tariff, calculated as a Class 4 proceeding.

_____ JA (ex officio JKB)