IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Abel v. Harlton,*
2024 BCSC 2036

Date: 20241107
Docket: S222488
Registry: Victoria

Between:

Laurie Lynn Abel

Plaintiff

And:

Lenore Brooke Harlton

Defendant

And:

Laurie Lynn Abel

Defendant by Counterclaim

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment Re Costs

Counsel for the Plaintiff and Defendant by Counterclaim:	K. Hauer
Counsel for the Defendant:	L.J. Alexander
Written Submissions of the Plaintiff and Defendant by Counterclaim Received:	August 9 and 26, 2024
Written Submissions of the Defendant Received:	August 23, 2024
Place and Date of Judgment:	Victoria, B.C. November 7, 2024

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I. INTRODUCTION

[1] On June 20, 2024, I rendered my judgment in this matter. My reasons are indexed as *Abel v. Harlton,* 2024 BCSC 1072 [*Reasons*]. At para. 148 of the *Reasons*, I stated that if the parties were unable to agree on a costs order, they could appear to speak to costs. The plaintiff, Ms. Abel, and the defendant, Ms. Harlton, did so through written submissions in August 2024.

[2] For the reasons that follow, I conclude that Ms. Abel is entitled to her costs of the trial at Scale B. I decline to award double costs.

II. BACKGROUND

[3] This was an action regarding a boundary dispute between two properties in a residential neighbourhood in Victoria, BC. Prior to the lot in question being subdivided into the two parcels owned by the parties, it had been described as having a 60-foot frontage. It was, in fact, a few inches short of 60 feet. The parcels belonging to Ms. Abel and Ms. Harlton were described as nominal frontage of 20 feet and 40 feet respectively. The ultimate question concerned who should bear the shortfall.

[4] The dispute surfaced after Ms. Abel began to undertake improvements to her land. In December 2021, Ms. Abel constructed a fence between the two properties, based on a survey she had commissioned from Mr. Sam Arsenault. After the construction of the fence, the shortfall of several inches became apparent. Ms. Harlton also hired a surveyor. Consequently, there were two competing survey reports filed in the Land Title Office.

[5] Ms. Abel filed a notice of civil claim requesting declaratory relief regarding the correct boundary, with the shortfall to be borne by Ms. Harlton. In her counterclaim Ms. Harlton requested a declaration that the shortfall be borne by Ms. Abel, an injunction requiring Ms. Abel to remove her fence, a declaration that Ms. Abel re-establish the sidewalk that was impacted by the fence, general damages and special

punitive and exemplary damages for trespass, and special damages for survey costs.

[6] The conflict between the parties ultimately came down to a legal question of priority. In the *Reasons*, I concluded that Ms. Harlton must bear the shortfall. I found that this outcome would be reached relying on either the first registration of a partial lot in absolute fee or the first registration of indefeasible title.

[7] I granted an easement to Ms. Abel for the .2 to 1.5 centimetres that Ms. Abel's fence encroached on the property of Ms. Harlton, with compensation of $5,000 in damages to Ms. Harlton to compensate her for the easement.

III. POSITIONS OF THE PARTIES

[8] Ms. Abel submits that as the prevailing party she should be awarded costs and that double costs should be awarded based on a settlement offer she proposed that was rejected by Ms. Harlton. She specifically requests:

a. double costs of all or some of the steps taken in the proceeding after the date of delivery of an offer to settle (Rule 9-1(5)(b)), or

b. costs fixed at Scale C for a matter of more than ordinary difficulty (s. 2 of Appendix B of the Rules), or

c. both (a) and (b).

[9] Ms. Harlton submits that the parties should bear their own costs, that double costs are not appropriate, and that if costs are to be awarded, they should be awarded on Scale B.

[10] Ms. Harlton relies on the context in which "the offer to effectively abandon resolution of the Boundary Issue was made":

a. none of the issues were caused by or brought on by the defendant;

b. the plaintiff made it impossible to proceed by way of a special case;

c. the defendant prepared and filed an application for summary trial pursuant to Rule 9-7 in an attempt to expedite the proceedings, but the plaintiff opposed proceeding in this manner; and

d. the offer was provided five weeks before the trial was scheduled to commence, after most of the work was completed.

[11] Ms. Harlton also argues that the acceptance of the settlement offer would have had her ignore the boundary dispute despite the investment in resolution forced on her by the plaintiff deciding to bring the matter before the Court. Further, given that this was a novel issue, Ms. Harlton claims that she had an arguable case and she should not be penalized for declining to settle a case which would just leave the issue for another day.

IV. DISCUSSION

A. Should an Order for Costs be made in Favour of the Plaintiff?

[12] The general rule is that, unless the court orders otherwise, costs of a proceeding must be awarded to the successful party: Rule 14-1(9) of the Supreme Court Civil Rules [*Rules*].

[13] Where success is divided, the court will typically order each party to bear their own costs: *Culos Development (1996) Inc. v. Baytalan,* 2024 BCSC 1634 [*Culos Development*] at para 7.

[14] The degree of fault of either party in creating the underlying facts that led to the need to come before the court is irrelevant in determining costs; ordinary costs are not punitive: *Eisler Estate v. GWR Resources Inc.,* 2020 BCSC 562 at para. 29.

[15] Ms. Harlton acknowledges that Ms. Abel was successful, but argues that she was not completely successful. Ms. Harlton points to the fact that I found Ms. Abel to be in technical trespass and ordered Ms. Abel to pay for the easement.

[16] While it is true that I ordered Ms. Abel to pay a one-time payment for the easement, I find that Ms. Abel nevertheless achieved substantial success within the

meaning of Rule 14-1(9). Substantial success does not require complete success. Indeed, a court should be cautious in parsing out the case on an issue-by-issue basis and should instead look at the issues globally: *Culos Development* at para. 26. Looking at the case globally, I find that Ms. Abel was the successful party. I granted Ms. Abel an easement and permitted her to retain her fence, and I was satisfied that the encroachment was minimal. Most importantly, I found that Ms. Harlton must bear the shortfall that was at the heart of the dispute.

[17] Despite one party being found to be the predominantly successful party, the court maintains discretion with respect to costs; the discretion should be exercised judicially and in a principled and cautious manner: *Meade v. Armstrong (City),* 2018 BCSC 528 at para. 20. Ms. Harlton argues that I should exercise this discretion to order that each party bear their own costs due to the novelty of the legal issue in this case. She points to the fact that there was no prior similar fact judicial authority and that both parties had a "reasonable degree of confidence" in their theories.

[18] This Court may depart from the general above rule with respect to costs where the action is a test case or in which the issue is novel. As stated in *Parmar v. Tribe Management Inc.* 2023 BCSC 88:

> [12] I accept that the general rule with respect to costs may be departed from where the action is a test case or in which the issue is novel. In such cases, "where the law is uncertain, it is appropriate to attenuate the litigation chill associated with possible adverse costs consequences": *Fischer v. IG Investment Management Ltd.*, 2014 ONSC 6260 at para. 9, cited in *Pryzk v. Hamilton Retirement Group Ltd. (c.o.b. Court at Rushdale)*, 2021 ONCA 267 at para. 35.

[19] A novel issue was concisely defined in *Przyk v. Hamilton Retirement Group Ltd. (The Court at Rushdale)*, 2021 ONCA 267 at para. 35, as one where "there is uncertainty in the law or where the facts make the guidance provided by prior cases inadequate". However, not all cases of first impression warrant an order of no costs: *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General),* 2024 BCSC 734 at para. 10; *Parmar* at para. 15. Even if I found that this was a case that was "truly novel" with an "open issue" within the meaning of the authorities (see e.g. *Baldwin v. Daubney* (2006), 21 B.L.R. (4th) 232, 2006 CanLII

33317 (Ont. S.C.), aff'd (2006), 275 D.L.R. (4th) 762, 2006 CanLII 32901 (Ont. C.A.), leave to appeal to SCC ref'd, *Baldwin v. B2B Trust and Laurentian Bank of Canada*, 2007 CanLII 15975 (S.C.C.); *Moore v. Getahun,* 2015 ONCA 443, at para. 2), I would use my discretion to order costs to the plaintiff in any case. A departure from the general rule for costs should only be done with "good reason": *Baart v. Kumar* (1985), 66 B.C.L.R. 61 (C.A.) at 66-67, 1985 CanLII 146 (C.A.), citing G. Peter Fraser, John W. Horn & Susan A. Griffin, *The Conduct of Civil Litigation in British Columbia*, 1st ed (LexisNexis Canada Inc., 1978) at 1097, Seaton J. concurring on this point.

[20] Cases of first impression that warrant a no costs order are generally test cases or cases regarding matters of public interest or importance: *Quercus Algoma Corporation et al. v. Algoma Central Corporation,* 2021 ONSC 4493 at para. 6; *Moore v. Getahun,* 2015 ONCA 443 at para. 2; *Parmar* at para. 24. While the narrow issues at hand were novel, this was fundamentally a dispute between two individuals regarding their personal interests. Although I address the issue of novelty again in the next section, at this juncture I note there was no assertion of a new right or cause of action, and no party was acting in the broader public interest.

[21] In these circumstances, I decline to depart from the general rule. The plaintiff is awarded costs.

B. Is the Plaintiff Entitled to Double Costs?

1. Legal principles regarding offers to settle

[22] Rule 9-1 of the *Rules* governs offers to settle. The Rule enables a court to consider an offer to settle in making a costs decision:

> **Definition**
>
> (1) In this rule, **"offer to settle"** means
>
> …
>
> (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
>
> (i) is made in writing by a party to a proceeding,

> (ii) has been served on all parties of record, and
>
> (iii) contains the following sentence: "The …….*[party(ies)]* ……., ……..*[name(s) of party(ies)]*……., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

….

Offer may be considered in relation to costs

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
>
> (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

….

[23] I find that the Offer complies with the formal requirements in Rule 9-1(1)(c).

[24] Rule 9-1(6) sets out the considerations that the court may consider in determining whether to make such an award:

Considerations of court

(6) In making an order under subrule (5), the court may consider the following:

> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[25] The court typically considers the factors listed in Rule 9-1(6), but they are not mandatory. This Court has the discretion to consider any factors it considers appropriate. Nevertheless, this discretion should be "exercised in a just, principled, and consistent way": *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282 at para. 88.

[26] The first question is which party was substantially successful. Here the plaintiff was the prevailing party in the cause. The submissions of the parties focused on the first and second considerations in Rule 9-1(6) and I agree that they are the relevant factors here. I will address them each in turn.

2. Whether the Offer was one that ought reasonably to have been accepted

[27] Ms. Abel argues that she should be entitled to double costs of all or some of the steps taken in the proceeding after the date of delivery of her offer to settle. On October 4, 2023, Ms. Abel made a formal offer to settle (the "Offer"). The Offer contained two options, only one of which could be accepted, but not both. Ms. Abel relies only on the first option for the purposes of double costs. This option was an offer to end the litigation, retain the boundary fence, and for Ms. Abel to pay $4,000 to Ms. Harlton. The Offer was left open for 20 days.

[28] Ms. Harlton rejected the Offer, but argues that this is not a situation where double costs should be awarded. I agree.

[29] The issue of reasonableness in a party's rejection of an offer is not determined by reference to the award that was ultimately made. Rather, it is assessed by reference to the circumstances existing at the time the offer was open for acceptance: *Hartshorne v. Hartshorne,* 2011 BCCA 29 at para. 27; *Yip v. Saran,* 2014 BCSC 1593 at para. 17. In other words, the Court should not conduct a

"hindsight analysis" as Justice Hinkson, as he then was, cautioned against in *Bailey v. Jang*, 2008 BCSC 1372 at para. 24. The question regarding whether the offer was reasonable and ought to have been accepted is whether, at the time of the refusal, the offer was an unreasonable one.

[30] A party who rejects a reasonable offer to settle typically faces some sanction in terms of costs to avoid undermining the importance of certainty and consequences in applying the Rule: *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. As the Court stated:

> [81] I do not quarrel with the general proposition that a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer. To do otherwise would undermine the importance of certainty and consequences in applying the Rule. The importance of those principles was emphasized by this court in *Evans v. Jensen*, 2011 BCCA 279:
>
> > [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

[31] Conversely, it is antithetical to the above-cited goals to penalize a party for proceeding to trial "in the face of an unreasonable offer." To determine this, judges can take into account whatever factors they consider to be appropriate, acting judicially: *Giles* at para. 88.

[32] In *Hartshorne*, the Court of Appeal identified several factors to consider when determining whether a settlement offer ought reasonably to have been accepted:

a) the timing of the offer;

b) whether the offer had some relationship to the claim or was instead a nuisance offer;

c) whether the offeree could easily have evaluated the offer; and

d) whether the offeror provided some rationale for the offer.

[33] The parties' submissions do not raise any significant issues with the timing of the Offer.

[34] In terms of the rationale for the Offer, Ms. Harlton argues that the Offer did not encompass any genuine compromises or incentives to settle. She contends it should therefore be considered a nuisance offer. She relies on the cases of *McVeigh v. McWilliams,* 2010 BCSC 655 and *Wilson v. Leung*, 2008 BCSC 1828, both of which involved settlement offers from the defendant that consisted of the plaintiff almost entirely withdrawing their claim and conceding their cause of action.

[35] I disagree with Ms. Harlton's contention that the Offer did not constitute any genuine compromise and was "only a tactical step" in an attempt to get double costs. I view it as a genuine attempt to reach reasonable pre-trial settlement. In fact, some of the compromises are recognized in the defendant's own submissions. This situation is unlike *McVeigh* and *Wilson*. As the plaintiff, Ms. Abel was willing to abandon her own claim through her offer and was offering a further $4,000 as a compromise.

[36] I acknowledge that the acceptance of the Offer would be a *de facto* admission by the defendant that the property line as surveyed by Mr. Arsenault for the plaintiff was the correct survey. However, this alone did not make the offer unreasonable.

[37] The concern I have is whether the Offer could easily have been evaluated at the time it was presented. As I already alluded to, the issues in this case were somewhat novel. The defendant relies on the fact this particular issue had not been before the courts prior to the parties' dispute. Based on this, she asserts she had an

arguable case. She emphasizes that the parties needed a court decision to determine the matter.

[38] I agree with Ms. Harlton that there is no previous legal precedent for a boundary dispute where both subdivided parcels are described as a particular portion of an original lot which had an error in its stated dimensions. There were similarly no authorities that could be located by either party addressing how a survey could determine where a shortfall lies when there is no original survey and no original boundaries to “re-establish”.

[39] While simply not knowing the outcome is insufficient to rebut double costs (*Tham v. Bronco Industries Inc.,* 2018 BCSC 240 at para. 16), double costs should not be a penalty for an inaccurate assessment of outcome: *Fryer v. Village of Nakusp*, 2023 BCSC 478 at para. 17; *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1497 at para. 19. Courts must strike a balance between encouraging settlement and chilling meritorious claims: *Makara v. Peter,* 2024 BCSC 975 at para. 12. Considering the uncertainty of the issues at play in this case and the lack of precedent on the legal question, it was not unreasonable for Ms. Harlton to have a belief in the merits of her claim and to reject the Offer based on this belief.

[40] I have also considered the general goals of the double costs rule. In *Giles*, Justice Frankel identified several purposes of the double costs rule: para. 74. In addition to indemnifying a successful litigant, those purposes include:

a) deterring frivolous actions or defences;

b) encouraging conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect;

c) encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases; and

d) facilitating a winnowing function in the litigation process by requiring litigants to make a careful assessment of the strength or lack thereof of their cases at

> the commencement and throughout the course of the litigation, and by "discourag[ing] the continuance of doubtful cases or defences" . . .

[41] Ms. Harlton's case was far from frivolous. While I ultimately disagreed with her interpretation of the effect of the sequence of registration and the effect of the legislation in dispute, it was an argument worthy of consideration. The questions to be answered at trial were questions about which "reasonable lawyers could disagree": *Brooks-Martin v. Martin,* 2011 BCSC 497 at para. 38, aff'd 2011 BCCA 357. I do not find that double costs are required to discourage Ms. Harlton from filing a future doubtful case or conduct that increases the duration of litigation.

[42] I note that Ms. Harlton attempted to take several other actions to try to reduce the time of the litigation, including attempting to have the matter heard by way of a Special Case under Rule 9-3, applying for a Summary Trial under Rule 9-7, and suggesting the evidence in chief of the parties be given in affidavit form at trial. Further, Ms. Harlton's ability to make a careful assessment of her case and its strength was limited by the novelty of the legal issues. The purposes of double costs are therefore not strongly applicable to this situation.

3. The relationship between the terms of the settlement as offered and the final judgment of the Court

[43] This second factor is the mirror image of the first factor and provides the court with an objective measurement of the reasonableness of the offer and the decision to reject it: *C.P. v. RBC Life Insurance Company,* 2015 BCCA 30 at para. 99. It is open to the trial judge to determine how much weight, if any, to place on this factor: *British Columbia v. Salt Spring Ventures Incorporated*, 2015 BCCA 343 at para. 20.

[44] The trial over six days yielded largely the same result as the Offer, except that Ms. Abel must pay $5,000 to the defendant rather than the $4,000 offered. The Offer constituted 80 percent of the amount that Ms. Harlton was eventually awarded. However, considering that this was only one component of the judgment, I do not find that this difference is significant enough to place considerable weight upon it.

[45] Indeed, Ms. Harlton argues that there is another important difference between the terms of the settlement and the final judgment of the Court; namely, that the Offer would have left the boundary issue unresolved. While the Offer would have allowed Ms. Abel to keep her boundary fence, I agree that the terms of the Offer would leave the actual boundary issue an open question. It would have resulted in two competing surveys filed with the Land Title Office and no final determination as to who bears the shortfall identified. This could be problematic for future purchasers of the properties. I find that this factor weighs towards Ms. Harlton.

[46] An award of double costs is a punitive award: *Wafler v. Trinh,* 2012 BCSC 1708 at para. 19, aff'd 2014 BCCA 95. Considering all of the factors described above, I do not think such an award is justified in these circumstances. I decline to order double costs.

C. Scale of Costs

1. Legal principles with respect to scale

[47] Unless ordered otherwise, costs are assessed as ordinary costs in accordance with Appendix B (Rule 14-1(1)). Appendix B provides:

> **Scale of costs**
>
> **2** (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
>
> (2) In fixing the scale of costs, the court must have regard to the following principles:
>
> (a) Scale A is for matters of little or less than ordinary difficulty;
>
> (b) Scale B is for matters of ordinary difficulty;
>
> (c) Scale C is for matters of more than ordinary difficulty.
>
> (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
>
> (a) whether a difficult issue of law, fact or construction is involved;
>
> (b) whether an issue is of importance to a class or body of persons, or is of general interest;

> (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
>
> . . .

[48] As set out in *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd*., 2010 BCSC 1494 at paras. 5-7 and *Parker Cove Properties Limited Partnership v. Gerow*, 2024 BCCA 316 at para. 65, several factors have emerged from case law that continue to be relevant for an assessment of the scale of costs:

> (a) Length of trial;
>
> (b) Complexity of issues;
>
> (c) Number and complexity of pre-trial applications;
>
> (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
>
> (e) The number and length of examinations for discovery;
>
> (f) The number and complexity of expert reports; and
>
> (g) The extent of the effort required in the collection of and proof of the facts.

2. Are Scale C costs appropriate?

[49] Considering the factors above and acknowledging that they are guidance and not a checklist, I conclude that Scale C costs are not warranted.

[50] Ms. Abel relies on the complexity of the litigation as a basis for Scale C costs. She argues that the matter required resorting to numerous archived and historical land title documents and the examination of arcane details of antiquated deeds. While I appreciate the added challenge of historical documents, this does not rise to the level of complexity to deserve Scale C costs. As pointed out by the defendant, while the documents were antiquated, they were not voluminous.

[51] Ms. Abel also points to the novelty of the issues in this trial. Scale C costs can be ordered when a court is called upon to decide a question for the first time, the answer to which may be significant beyond the parties: *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1907 at para. 24. Ms. Abel highlights that this is the first case as to legal principles and

theory to apply in a boundary dispute that results form subdivided parcels that are both described with nominal frontage taken from the original whole when, in fact, the whole falls short of its stated frontage.

[52] While the parties did go down the path of hiring competing surveyors, I did not find their reliance on historical documents to exceed what is often presented in other cases of ordinary difficulty. I come to this conclusion because although there were competing surveys and several historical documents, the dispute centered, ultimately, on a relatively simple legal question of priority.

[53] Moreover, a novel matter is not necessarily complex: *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited,* 2012 BCSC 1475 at para. 17, citing *Trian Equities Ltd. v. Beringer Acquisitions Ltd.,* [1993] 7 W.W.R. 348, 1993 CanLII 2213 (BC SC). The lack of judicial authority on the main issue in this case does not, in itself, indicate complexity beyond ordinary difficulty: *Snaw-Naw-As First Nation v. Attorney General of Canada,* 2020 BCSC 1967 at para. 43. Here, each party called only one expert, the arguments regarding damages and admissibility of expert reports were fairly routine, the trial lasted six days, and the examinations for discovery for each party took less than a half day, with neither party cross-examining on the discovery transcripts at trial. There were several matters consented to throughout the proceedings and the parties cooperated on document production and a joint book of documents. None of this indicates that the case was beyond ordinary difficulty, even accepting that the legal questions were novel.

[54] Ms. Abel further argues that Ms. Harlton made the trial more difficult by bringing several back-to-back applications challenging the evidence of the plaintiff's surveying expert Glen Quarmby, one of which was brought without notice.

[55] While counsel for the defendant could have raised their concerns in a more efficient fashion, there were genuine and legitimate concerns with the witness's report, and the defendant was within her right to raise them. Moreover, I addressed

the lack of notice mid-trial. I observed nothing at trial that would suggest improper conduct in the cross-examination of the plaintiff's expert witness.

[56] I find that Scale C costs are not justified in these circumstances.

V. CONCLUSION

[57] I find that the plaintiff was the prevailing party and the action was of ordinary difficulty. Moreover, while the Offer was reasonable, it was not unreasonable for Ms. Harlton not to accept the Offer at the time it was presented based on the novelty of the issues.

[58] Costs are awarded to the plaintiff, on Scale B.

"D. MacDonald J."