Court of King's Bench of Alberta

Citation: Pacific Atlantic Pipeline Construction Ltd v. Coastal Gaslink Pipeline Ltd, 2024 ABKB 696

Date: 20241125
Docket: 2303 19140
Registry: Edmonton

Between:

Pacific Atlantic Pipeline Construction Ltd. and Bonatti S.P.A.

Applicants

- and -

Coastal Gaslink Limited Partnership by its General Partner Coastal Gaslink Pipeline Ltd.

Respondent

Corrected judgment: A corrigendum was issued on November 28, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Justice N. Whitling

I. Introduction

[1] This decision addresses an application by the Respondent for costs as well as "interest" on an undertaking as to damages. The proceedings for which the Respondent now seeks costs include those which resulted in the decisions reported as ***Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd***, 2023 ABKB 736 and ***Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd***, 2024 ABKB 17.

[2] In very brief terms, this action involved an application by the Applicants for an injunction prohibiting the Respondent from drawing upon an irrevocable letter of credit with a face value of $117,162,384.00, which the Applicants had caused to be issued to secure their performance of a large pipeline construction project. Although three "interim interim" injunctions were issued to allow the Applicants to bring their application and a subsequent appeal, the application was ultimately denied. That denial was affirmed by the Court of Appeal of Alberta and leave to appeal that decision was denied by the Supreme Court of Canada.

[3] For the reasons which follow, I award the Respondent costs against the Applicants in the amount of $287,816.30 in fees and $34,366.16 in disbursements. Both amounts are inclusive of GST. The fee portion of this award represents indemnification at a level of 35%.

[4] I also conclude that the Respondent's claim for damages pursuant to the Undertaking as to Damages cannot be fairly determined in the context of the present application and must be determined by a referee pursuant to r. 6.45 of the *Alberta Rules of Court*.

II. Costs

A. Introduction

[5] The Respondent seeks full indemnification costs from the Applicants. In total, the Respondent seeks $856,698.44, which figure is comprised of $822,332.28 in legal fees and $34,366.16 in disbursements, both inclusive of GST.

[6] Alternatively, the Respondent seeks "costs at the high end of the ***McAllister*** range", in reference to ***McAllister v City of Calgary***, 2021 ABCA 25, in which the Court of Appeal recognized "the 40-50% partial indemnification guideline" as having been "utilized for a number of years as providing a reasonable level of indemnification" (para. 45). This approach is grounded in r. 10.31(3)(a) of the *Alberta Rules of Court* which provides that the Court may order "all or part of the reasonable and proper costs …without reference to Schedule C".

[7] The Applicants submit that the enhanced costs sought by the Respondent are not justified. Instead, they submit that costs ought to be assessed on the scale of 2x Column 5 of Schedule C. This approach is grounded in r. 10.31(3)(a) which provides that the Court may order "a multiple… of an amount set out in any column of the tariff in Division 2 of Schedule C". The Applicants also request an Order for an assessment of costs by an assessment officer pursuant to r. 10.34(1), and a direction that the Respondent provide an unredacted summary of its counsel's time entries for the purposes of that assessment.

[8] The granting of costs is an inherently discretionary matter, provided that the Court's discretion is exercised in a principled and rational manner: ***Orbis Engineering Field Services v Taifa Engineering Ltd.***, 2019 ABQB 592 at para. 5; ***Blaze Energy Ltd. v Imperial Oil***

Resources, 2014 ABQB 5098 at para. 66. This discretion is guided by the non-exhaustive list of factors in r. 10.33.

[9] An analysis of the factors of significance to this costs application follows.

B. Importance

[10] Pursuant to r. 10.33(1)(c), I may consider "the importance of the issues" to the parties.

[11] This proceeding involved a very large amount of money. Although there was no "amount claimed" for the purposes of r. 10.33(1)(b), the Applicants sought an injunction prohibiting the Respondent from drawing upon a letter of credit with a face value of $117,162,384.00. Discussions that occurred between the parties suggested that such a draw would have a detrimental impact upon the Applicants' business operations around the world. The following comments of the Court of Appeal in ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co.,*** 1998 ABCA 118 at para. 12 are equally applicable to the circumstances of this case:

> Another factor is the seriousness of this suit. The amounts were enormous, the charges were grave, and the business implications considerable. If ever there was a suit which did not call for penny-pinching half measures by the defendant, this was it.

C. Complexity

[12] Pursuant to r. 10.33(1)(d), I may consider "the complexity of the action".

[13] This proceeding engaged points of law which were not settled in Alberta. These points included whether a draw on a letter of credit may be enjoined on grounds other than fraud, and if so, what standard of proof applies. Although the law which governed other aspects of the case was more settled, the application of that law to the facts was not free from doubt.

[14] Given the significance of the issues at stake, the evidence led by the Applicants was extensive. The Applicants filed 10 affidavits which necessitated numerous questionings and re-questionings. Those affidavits were prepared and served on a "rolling basis" between October, 2023, and January, 2024, as the circumstances developed. This made the scheduling of questionings difficult.

[15] The quantity of evidence prepared by the Applicants necessitated a significant quantity of evidence in response. The Respondent prepared and relied upon 5 affidavits, including one from Lazar Sarna, author of the leading text Lazar Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed. Toronto: Thomson Carswell, 2024. This evidence was appropriate given the quantity and quality of the evidence relied upon by the Applicants.

[16] I conclude that the complexity of this action, both in terms of the law and the evidence, was relatively high.

D. Degree of Success

[17] Pursuant to r. 10.33(1)(a), I may consider "the result of the action and the degree of success of each party".

[18] The Respondent was almost entirely successful in this action. The Applicants' request for an injunction was denied. However, brief interim injunctions were granted by Justice Kiss and myself so as to facilitate a fair determination of these proceedings before this Court and the

commencement of a subsequent appeal. Additional analysis respecting the proceedings before Justice Kiss is provided below.

E. Number and Expertise of Counsel

[19] Pursuant to r. 10.33(1)(g), I may consider "any other matter related to the question of reasonable and proper costs that the Court considers appropriate". Under this heading, although not specifically raised by the parties, a circumstance that I have found to be of significance to my decision is the number and expertise of the counsel for both sides.

[20] The parties are three large and sophisticated commercial entities. Given the importance of this case to their business operations, they both took an expansive approach to their legal representation.

[21] At the hearings before me in this matter, the Applicants were represented by five lawyers from two large law firms. One of the firms is based in Toronto. The Applicants' lead counsel, Mr. Valo, was counsel in ***Veolia Water Technologies, Inc. v K+S Potash Canada General Partnership***, 2019 SKCA 25, being the case of the greatest precedential importance to the issues in this action. Mr. Valo is also the author of the article Michael Valo & Markus Rotterdam, *Beyond Fraud: Rethinking the Autonomy of Letters of Credit*, [2020] I.C.L.R. 72 which contains an extensive analysis of both the Canadian and foreign case law respecting the central issues in the application. Clearly, the Applicants spared no expense in their own legal representation.

[22] Given the approach taken by the Applicants, it was understandable that the Respondent retained a sophisticated and expensive legal team of its own. The Respondent was represented at the main hearing of this matter by five lawyers from a large Calgary firm. The time entries attached to the Respondent's affidavit reflect 1,419 hours of work completed by 13 different lawyers. Despite this exceptional volume of work, it cannot be said that the Respondent's approach to its representation was overzealous or inefficient. Rather, it was proportionate to that taken by the Applicants, and also reasonable given the importance of the matters at stake.

[23] In conclusion, the legal costs for which the Respondent now seeks indemnification were well beyond those normally incurred in the "common stream of litigation" (***McAllister*** at para. 59 citing ***Trizec Equities Ltd. v Ellis-Don Management Services Ltd.***, 1999 ABQB 801 at para. 27), and their scale was reasonable and proportionate in all the circumstances.

F. Potential Costs Awards under Schedule C

[24] Also under r. 10.33(1)(g), I have considered the range of costs awards that could potentially be made by reference to Schedule C of the *Alberta Rules of Court*.

[25] The Respondent's evidence reflects total legal fees paid of $822,332.28 and disbursements of $34,366.16 both inclusive of GST. For comparison, the Respondent has also provided estimations of what its costs award would be if calculated by various approaches to Schedule C. Applying the column normally applicable to injunction applications, being Column 1, the Respondent would be entitled to approximately $10,800.00 plus disbursements. If a 3x or 5x multiplier were to be applied to Column 1, Schedule C costs would be in the range of approximately $32,400.00 to $54,000.00. If Column 5 of Schedule C with no multiplier were to be applied, the Respondent would receive approximately $33,750.00. If a 3x or 5x multiplier were to be applied to Column 5, the Respondent would receive approximately $101,250.00 to $168,750.00.

[26] So, even stretching the scale reflected in Schedule C to a 5x multiplier of its highest column, the Respondent would only receive about 24% of its actual costs. This level is roughly half of the 40-50% "target level" underlying Schedule C. This consideration confirms that the litigation that occurred in the present case is unlike that contemplated by the Schedule C Committee when it formulated the tariff (see ***McAllister*** at para. 43).

G. Availability of Arbitration Proceedings

[27] In support of its request for full indemnification costs, the Respondent points out that the parties are engaged in related arbitration proceedings, that the injunction proceedings could have been submitted to arbitration. Since solicitor-client costs have been recognized as the norm in arbitration proceedings, they argue that a scale of solicitor-client costs ought to be a "useful starting point" for costs before this Court.

[28] With respect, I do not find this consideration to be significant. While it is true that solicitor-client costs have been recognized as the norm in arbitration proceedings, the proceedings before this Court are not arbitration proceedings. The Applicants cannot be faulted for exercising their fundamental right to access the Courts, particularly given that their right to do so is preserved by s. 8(1) of the *Arbitration Act* of Alberta, and I did find it appropriate to determine the application despite the potential availability of arbitration.

[29] Consequently, I do not find that the scale of solicitor-client costs applicable to the related arbitration proceedings represents a "useful starting point" or otherwise significant for costs in this action.

H. Conduct Lengthening the Proceedings

[30] Pursuant to r. 10.33(2)(a), I may consider "the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action".

[31] Despite the Respondent's able arguments, I do not find that the Applicants have engaged in any conduct which may be said to have unnecessarily lengthened or delayed this action. While the Applicants' evidence and arguments were extensive, they were not excessive given the importance of the interests at stake. And while it may fairly be said that the Applicants played a "weak hand" with some of their arguments, I do not find that any of their arguments were hopeless or otherwise unreasonable in the circumstances.

I. Unproven Allegations of Dishonesty

[32] Costs on a solicitor-client scale may be appropriate where a party has made unsuccessful allegations of fraud or dishonesty with access to information sufficient to conclude that the other party was neither dishonest nor fraudulent: ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9 at para. 26.

[33] I do not find that the Applicants have made allegations against the Respondent amounting to fraud or dishonesty. The Applicants did argue that the Respondent's conduct amounted to a breach of the duty of honest contractual performance. The Applicants also submitted that the Respondent acted in an "unconscionable" and "capricious" manner. At one point during the heat of oral argument, counsel for the Applicants even described a certain email from the Respondent as "extortionate" but then quickly discontinued his use of that term. But the specific facts underlying the Applicants' allegations were not, in my view, of such a nature as to have harmed the reputation of the Respondent or its representatives. Indeed, the evidence when boiled down

reflected little controversy as to what actually transpired. In the end, the alleged conduct was proven, but found not to justify the relief sought.[1]

[34] I do not find that the Applicants made unproven allegations of dishonest conduct of such a nature as to call for an enhanced costs award.

J. Unnecessary or Improper Proceedings

[35] Pursuant to r. 10.33(2)(d), I may consider "(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake".

[36] In response to the Respondent's criticisms of the Applicants' own conduct of this action, the Applicants point to the fact that the Respondent unreasonably refused to agree to even a brief forbearance upon its ability to draw upon the letter of credit, which effectively required the application to be brought forward initially in urgent chambers before Justice Kiss. This approach deprived Justice Kiss of any reasonable ability to prepare for or determine the application on its merits.

[37] In granting an "interim interim" injunction over the Respondent's objection, Justice Kiss expressed her disappointment with the Respondent's refusal to agree to even a brief forbearance on the letter of credit so as to facilitate a fair hearing. She also questioned the appropriateness of the legal costs incurred for the two hearing days before her:

> So, I am of the view that the position taken by the respondents in refusing to put this matter over given the efforts that the Court has made, quite frankly, to accommodate this hearing in light of the fact that it was an unscheduled application, that it has now been before the Court 2 days in a row, and that our Associate Chief Justice was prepared to move mountains, quite frankly, to make time available for a full hearing. I am disappointed.
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> […]
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> But I have to question how this is in the client's best interests and the costs associated with yesterday and today's application, I mean, are significant. I appreciate that most of these materials will you know end up either before the Court of Appeal or the next justice, but nevertheless having to do all this and put everyone through working throughout the night just did not seem to be a reasonable approach to this.

[38] I respectfully agree with Justice Kiss that the Respondent ought to have taken a more reasonable approach to the procedure to be followed in this action. I of course recognize the importance of ensuring that letters of credit provide beneficiaries with a "ready means of obtaining prompt payment" (***Pacific Atlantic Pipeline Construction Ltd. v Coastal Gaslink Pipeline Ltd.***, 2024 ABCA 74 at para. 7), but it was unrealistic for the Respondent to expect this Court to dispose of this action in urgent chambers on 24 hours' notice.

[39] At the end of the day, I do not find the Respondent's conduct of the proceedings before Justice Kiss to have been so unreasonable as to have rendered those hearings "unnecessary" or "improper" for the purposes of r. 10.33(2)(d). But I do find that the result of those proceedings

[1] These facts were summarized in ***Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd.***, 2023 ABKB 736 at paras. 63-69.

reduces the Respondent's overall "degree of success" in the action for the purposes of r. 10.33(1)(a). As explained below, I find this consideration to have a significant impact upon the Respondent's entitlement to costs.

K. Schedule C or a Percentage of Assessed Costs?

[40] Having considered the circumstances summarized above, I conclude that a scale of costs based upon a multiplier of Schedule C of the *Alberta Rules of Court* would not be appropriate in the circumstances of this case. Even a 5x multiplier of Schedule C's highest column would only result in an indemnity level of about 24%. And, as stated above, the exceptional scale of the Respondent's legal costs was reasonable and proportionate given the importance of the issues and the Applicants' approach to its own legal representation.

[41] For these reasons I find that the "complexity and intensity" of the litigation in the present case was more akin to that addressed by Justice Jones in ***Athabasca Minerals Inc v Syncrude Canada Ltd***, 2018 ABQB 551 than to that addressed by Justice Mah in ***Orbis Engineering Field Services v Taifa Engineering Ltd***., 2019 ABQB 592 at paras. 11-13, and I therefore find it more appropriate to order the Applicants to pay "part of the reasonable and proper costs" incurred by the Respondent "without reference to Schedule C" pursuant to r. 10.31(3)(a). That is, I adopt the "option of awarding costs as a percentage of assessed costs" examined in ***McAllister*** at para. 46.

L. The Applicants' Request for a Reference to an Assessment Officer

[42] The Respondent has submitted an affidavit attaching a report of the legal costs it incurred in responding to the proceedings in this Court. This evidence includes 27 pages of time entries for 1,419 hours of work completed by 13 lawyers. These documents omit the descriptions of services provided in order to preserve solicitor-client privilege. The Applicants now request an order directing that these charges be assessed by an assessment officer pursuant to r. 10.34(1), and an accompanying direction that the Respondent provide an unredacted summary of its counsel's time entries for the purposes of that assessment.

[43] Having reviewed the Respondent's affidavit and the Applicants' submissions on this point, I conclude that an assessment of the Respondent's legal costs by an assessment officer is not warranted. I reach this conclusion for two main reasons.

[44] Firstly, the Applicants have not brought forward any evidence or argument which raises significant concerns respecting the propriety of the time entries or disbursements reflected in the Respondent's affidavit. They also have not quantified their own legal costs for the purposes of comparison.

[45] The main concern raised by the Applicants is that there is a "high likelihood of overlap in the fees claimed between the Injunction Application, the Arbitration, and the Appeal". I would characterize this "high likelihood" a theoretical possibility. There is no evidentiary basis for me to conclude or suspect that the Respondent has included improper costs in its materials, and a fishing expedition to test the Applicants' hypothesis of "overlap" is not warranted.

[46] The Applicants also suggest that it may have been inappropriate for the Respondent to have retained counsel from Calgary given that the hearings in this matter occurred in Edmonton. But these arguments ring hollow given that the Applicants' own lead counsel were based in Toronto.

[47] Secondly, it appears most likely that, given the manner in which this proceeding has been litigated to date, the additional litigation costs of an assessment of fees and disbursements would exceed the value of any amounts that are seriously in dispute.

[48] The few specific examples of potentially unreasonable charges that the Applicants identify include $2,760 for two airplane tickets, $1,780 in hotel charges, and $366 in Uber expenses. The Applicants also criticize the $11,250 for Mr. Sarna's affidavit given that it contained an expert opinion on domestic law. But given that the issues in this action were worth some $117,162,384.00, these disbursements may fairly be described as minor, and in any event, the Applicants' arguments do not raise serious concerns respecting their propriety.

[49] In the end, it is to everyone's advantage to have the question of costs resolved in the context of the present application. The Applicants' request for a referral to an assessment officer is therefore denied.

M. The "reasonable and proper costs that [the Respondent] incurred"

[50] Since I have denied the Applicants' request for an order directing an assessment of the Respondent's legal costs, that task now falls to me.

[51] In assessing the "reasonable and proper costs that [the Respondent] incurred" for the purposes of r. 10.31(1)(a), I must take into account the factors set forth in Rule 10.2(1) regarding whether or not a lawyer's fees are reasonable as between the lawyer and his or her client (***McAllister*** at para. 47). The circumstances that I have found to be of importance to this assessment are as follows.

[52] This matter was both very important and very urgent (r. 10.2(1)(a)). The Respondent was seeking to collect some $117,162,384.00, the Applicants were seeking to enjoin collection, and the time value of such a large amount of money is high.

[53] The Respondent is a large commercial entity for the purpose of constructing a major pipeline project and had significant litigation resources at its disposal (r. 10.2(1)(b)).

[54] The legal services were performed by the Respondent's counsel in a thorough, "leave no stone unturned" manner (r. 10.2(1)(d)), which was appropriate in the circumstances.

[55] There was a high degree of skill, work, and responsibility involved (r. 10.2(1)(e)).

[56] The approach taken by the Respondent's counsel was proportionate to that taken by the Applicants' counsel (r. 10.2(1)(f)).

[57] The Applicants' submissions do not identify any serious concerns respecting the propriety of any of the charges incurred (r. 10.2(1)(f)). In reaching this conclusion, it is acknowledged that that the Applicants do not have the benefit of unredacted copies of the time entries prepared by the Respondent's counsel.

[58] Having considered these circumstances, I conclude that the legal costs reflected in the Respondent's affidavit are "the reasonable and proper costs that [the Respondent] incurred" for the purposes of 10.31(1)(a).

[59] I therefore assess the "reasonable and proper costs that [the Respondent] incurred" at $822,332.28 in legal fees and $34,366.16 in disbursements, both inclusive of GST.

N. Level of Indemnification

[60] In ***McAllister***, the Court of Appeal examined the 40-50% indemnity guideline in the following terms:

> […] 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.

[61] The Court of Appeal went on in ***McAllister*** to explain at paras. 41-46 that if the option of awarding costs as a percentage of assessed costs is chosen, then the 40-50% partial indemnification "guideline" has been described as a "general rule" or a "target", and it "normally" reflects the level of indemnification granted.

[62] In terms of the specific level of indemnification to apply in any given case, the Court of Appeal in ***McAllister*** wrote:

> … [W]e refrain from defining with any precision the level of indemnification required in any given case. 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 [40-50%] 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.

[63] I conclude that the circumstances of this case warrant a level of indemnification somewhat below the 40-50% range. I reach this conclusion primarily due to the approach adopted by the Respondent to the initial proceedings before Justice Kiss as examined above. The net result of those proceedings was that Justice Kiss agreed with the Applicants that this action could not be fairly disposed of in the context of urgent chambers as the Respondent insisted. She also expressed disappointment in the approach taken by the Respondent and questioned the propriety of the costs incurred for those 2 hearing days.

[64] I have not attempted to disentangle the costs of the proceedings before Justice Kiss from those applicable to the remainder of this action. It suffices for present purposes to note that the proceedings before Justice Kiss occurred over 2 days, and the applications before me also occurred over 2 days. So, the proceedings before Justice Kiss comprised a substantial proportion of the court time involved in this action.

[65] At the end of the day, there is no hard and fast rule to be applied and a line must be drawn somewhere.

[66] I conclude that an award of costs to the Respondent at an indemnification level of 35% is appropriate. This level shall be applied to the legal fees portion of the Respondent's costs. The Respondent shall be entitled to 100% of its disbursements.

O. Conclusion on Costs

[67] Applying the indemnification level of 35% to the Respondent's assessed legal fees of $822,332.28, the Respondent is awarded costs in respect of its legal fees in the amount of $287,816.30. The Respondent is also awarded $34,366.16 in disbursements. Both amounts are inclusive of GST.

III. The Respondent's Claim for "Interest" on the Undertaking as to Damages

[68] In addition to costs, the Respondent seeks an award of "interest" in the amount of $2,267,884.75 on the Applicants' Undertaking as to Damages. That figure represents interest at 7% on $117,162,384.00 for the period October 17, 2023, (when the interim interim injunction was granted by Justice Kiss) to January 25, 2024, (when the second interim interim injunction granted by me expired). In the Undertaking as to Damages filed by the Applicants on October 17, 2023, the Applicants undertook to compensate the Respondent "for any damages that by subsequent decision of this Honourable Court are held to have resulted from the granting of the injunctive relief sought by the Applicants."

[69] The Applicants object to the determination of this issue in the context of the present application. In their words, a claim on an undertaking as to damages "is not a throw-away process that can be tacked onto to written costs brief, particularly when the amount at issue exceeds $2 million." In support of their position, the Applicants rely upon such cases as ***White Bear Construction Ltd. v Casavant***, 2000 ABQB 640 at paras 38-41 and ***Tiger Calcium Services Inc v Sazwan***, 2019 ABQB 623.

[70] As Justice Shelley observed in ***Tiger Calcium*** at para. 25, the Courts have broad discretion as to how to determine damages pursuant to an undertaking. In some instances, courts have ordered such damages to be determined at a trial. In other cases, courts have held that damages can be determined in a summary process.

[71] In a number of cases, a claim pursuant to an undertaking as to damages has been dealt with by way of an inquiry or reference pursuant to what is now r. 6.45. One such case is ***Vieweger Construction Co. v Rush & Tompkins Construction Ltd.***, [1965] SCR 195 where Justice Spence directed "that there be a reference in the ordinary course of procedure in the Province of Alberta to determine such damages". Another such reference was addressed by Master Funduk in ***Watson & Buck Oilfield Servicing Ltd. v Clifford***, 2002 ABQB 604.

[72] As noted above, it is desirable to bring these matters to a conclusion without further litigation. I also assume without deciding that I could determine the Respondent's claim on the undertaking in the context of the present application. Nevertheless, I find it necessary to refer the matter of interest to a referee for the following reasons.

[73] Firstly, the Respondent's approach of simply applying the rate of interest contained in an inapplicable contractual provision to the face value of the letter of credit is problematic. The Applicants did not provide an undertaking to pay interest. Instead, they provided an undertaking as to "damages". That term denotes compensation for a "loss, detriment, or injury" suffered (*Black's Law Dictionary*, 6th ed., St. Paul, Minn: West Publishing Co. 1990). Although there is an inherent time value to money, the rate at which the Respondent could have borrowed other money from a lender does not necessarily reflect a loss, detriment or injury.

[74] Secondly, the evidence relied upon by the Respondent in support of its damages claim is too scant to enable a fair determination. That evidence consists of a single-page document reflecting the prime rate of interest charged by the RBC during the relevant period. Like Justice Spence in ***Vieweger***, I find that "there has been no proper proof of damages" in the amount claimed.

[75] Finally, as the Applicants point out, the amount of damages at issue in this case is large. I agree with the Applicants that ordering them to pay over $2 million in the context of the present costs application would be inadvisable and unfair. A more robust inquiry is required.

[76] I therefore direct that the Respondent's claim for damages pursuant to the Undertaking as to Damages be determined in the context of a reference or inquiry under r. 6.45. I note that a Justice of this Court does not fall within the definition of referee in r. 6.44. Consequently, any further directions as to the conduct of that reference or inquiry shall be sought from an applications judge or other referee. As always, it would be desirable if the parties could resolve this issue without further litigation.

IV. Conclusions and Order Granted

[77] The Respondent is awarded costs against the Applicants in the amount of $287,816.30 in fees and $34,366.16 in disbursements. Both amounts are inclusive of GST.

[78] Failing resolution, the Respondent's claim for damages pursuant to the Undertaking as to Damages shall be determined by a referee pursuant to r. 6.45 of the *Alberta Rules of Court*.

Heard by way of written submissions.
Dated at the City of Edmonton, Alberta this 25th day of November, 2024.

N. Whitling
J.C.K.B.A.

Appearances:

Dan Carroll, K.C., Austin Ward
Field LLP
for the Applicants

Keith Marlowe, K.C., Lindsay Rowell, Alyssa Duke and Laura Cundari
Blake, Cassels & Graydon LLP
for the Respondent

Corrigendum of the Memorandum of Decision
of
The Honourable Justice N. Whitling

Paragraph 15, first sentence, word Applicant changed to reflect Applicants.
Paragraph 15, second sentence, word Respondents changed to reflect Respondent.
Paragraph 40, last sentence, word Applicant's changed to reflect Applicants'.
Paragraph 73, second sentence, word Applicant changed to reflect Applicants.
Paragraph 73, last sentence, word Applicant changed to reflect Respondent.