IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *XTL Inc. v. FPS Food Process Solutions Corporation,* 2025 BCSC 4

Date: 20250102
Docket: S197023
Registry: Vancouver

Between:

XTL Inc.

Plaintiff

And

FPS Food Process Solutions Corporation

Defendant

And

XTL Inc.

Defendant by Counterclaim

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment Re: Costs

Counsel for the Plaintiff and Defendant by Counterclaim:	J. Zeljkovich
Counsel for the Defendant:	J. Shewfelt
Place and Dates of Hearing:	New Westminster, B.C. December 12 and 19, 2024
Place and Date of Judgment:	Vancouver, B.C. January 2, 2025

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I. Introduction

[1] This is an application by the plaintiff and defendant by counterclaim, XTL Inc. ("XTL") for an order for special costs or, in the alternative uplift costs, against the defendant, FPS Food Process Solutions Corporation ("FPS").

[2] The trial that has led to XTL's application for special costs commenced before me in December 2023 and, after a pause, concluded with a continuation on April 5, 2024. The dispute at trial related to a failed contractual relationship in which XTL, a company that provides transportation, logistics and warehouse facilities throughout the east coast of the United States, contracted with FPS, a company located in British Columbia that manufactures industrial food processing equipment, including freezers, to manufacture an industrial "carton" style freezer (the "Freezer Project").

[3] XTL was unable to proceed with the Freezer Project, and wanted the return of its advanced payments. FPS argued at trial that it was entitled to set-off the amounts it had incurred up to the time the Freezer Project was cancelled against the advanced payments. To put some scale on the amounts involved, if completed, the value of the contract was over US$3,000,000 and XTL had made advanced payments of US$762,500. FPS argued that it had incurred expenses before the contract was terminated of CA$479,302. Accordingly, FPS claimed reliance damages in that amount to be set-off against XTL's advance payments.

[4] On August 28, 2024, I provided reasons for judgment indexed as *XTL Inc. v. FPS Food Process Solutions Corporation*, 2024 BCSC 1581 (the "Reasons"). At the conclusion of the Reasons, I determined that XTL was substantially successful at trial and awarded it costs at Scale B. However, I provided the parties with leave to return before me if there were issues of costs needing resolution. XTL took that opportunity and now seeks an order for increased costs.

[5] XTL contends that an award for enhanced costs is warranted in the circumstances of this case, because FPS either intentionally failed to properly investigate the facts supporting its defence, or was reckless in not bothering to do so. As I will describe below, the basis of XTL's argument is that in this litigation, FPS

initially took the position that it was unable to reuse components related to shelves it manufactured specifically for the Freezer Project (the "Shelves"). FPS asserted in pleadings, in affidavits filed with the Court, and at examinations for discovery that its expense to manufacture the Shelves was unrecoverable. On that basis, FPS claimed it was entitled to set off the cost of the Shelves, in addition to the other costs it incurred in the Freezer Project, against XTL's advance payments.

[6] However, on January 13, 2023, the Friday before Monday January 16, 2023, when a trial was scheduled to commence before Justice Lamb, FPS advised counsel for XTL that it had discovered that the Shelves had been repurposed and so were not part of the loss it claimed in its set-off defence.

[7] XTL argues that repeatedly misrepresenting that the Shelves were not salvageable delayed the trial and fundamentally changed the landscape of the litigation. XTL contends that the ongoing misrepresentation in pleadings, affidavits and at discovery of a crucial fact that was exclusively within FPS's knowledge is egregious or at least reckless and worthy of the Court's rebuke warranting some form of enhanced cost award.

[8] FPS contends that whether or not the fact that the Shelves were repurposed was disclosed earlier would not have significantly changed anything in the litigation. While FPS argued at trial that it was entitled to reliance damages based on the costs it had incurred in relation to the Freezer Project (not including the costs of the Shelves), it opposes XTL's costs argument based on its alternate submission advanced at trial. The alternative argument it raised at trial was that the Court should assess the damages it suffered as a result of the failure of XTL to complete the Freezer Project based on expectation damages. In other words, that claim was based on the profit FPS alleges it lost due to a failure of XTL to complete the Freezer Project. FPS contends that the same evidence related to the costs of manufacturing the Shelves would need to be adduced as evidence at trial, whether the Shelves were repurposed or not, to demonstrate that FPS's claim for expectation damages was reasonable.

[9] I find there are two issues before me. First, is FPS's conduct in either intentionally misrepresenting whether the Shelves were repurposed or failing to fully investigate that fact worthy of sanction in the form of an enhanced costs award? Second, if an award of enhanced costs is warranted, what is the nature of that enhancement and for what duration of the litigation should it apply?

[10] In these reasons for judgment, I will provide a brief background and then move to my analysis and determination.

II. Background

[11] In the Reasons, I set out the nature of the dispute between FPS and XTL at trial as follows:

> [1] In this trial, the plaintiff and defendant by counterclaim, XTL Inc. ("XTL") seeks return of the funds it paid to the defendant and plaintiff in the counterclaim, FPS Freezing Process Solutions Corporation ("FPS"), for a large variable retention multi-pass industrial freezer system (the "Freezer") that XTL contracted FPS to build (the "Freezer project" or "project"). The initial contract price for the Freezer was US$3,050,000. XTL paid US$762,500 to FPS as a down payment or partial payment and FPS commenced work on building the Freezer. XTL was unable to obtain financing to complete the project and the Freezer was never completed.
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> [2] The heart of XTL's claim is what amount, if any, FPS is entitled to set off against the US$762,500 owing to XTL. The parties disagree as to what amount FPS expended on building the Freezer before it was clear that the project was not going to complete.
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> [3] In respect of XTL's claim for a return of a portion of the amounts paid to FPS, the parties' positions are relatively simple. FPS contends that the amounts it incurred in commencing the manufacture of the Freezer are legitimate, reasonable and appropriate. As I will describe below, the vast majority of the expenses claimed by FPS relate to design and engineering work performed by a New Zealand company, Freezing Solutions Limited ("FSL"). FPS asserts that the expenses it (and FSL) incurred were necessary and appropriate given the requirements to complete the Freezer under the timelines of the project. Further, FPS argues that XTL repeatedly assured them that XTL would get financing to proceed with the project, even after payment deadlines were missed.

[12] I concluded that FPS overstated its set-off claim and was entitled to offset the amount of NZ$378,236.87 as well as a smaller amount for travel incurred by FPS to attend meetings with XTL. For perspective, although it does not reflect the point in

time when the money was actually owing, as a rough estimate, the set-off amount just referenced in New Zealand dollars converted to Canadian currency at today's exchange rate is approximately CA$310,000.

[13] As referenced above, in its Response to Civil Claim, filed on September 19, 2019, FPS claimed that it incurred costs related to manufacturing the Shelves. The claim was set out in the Response to Civil Claim as follows:

> At the time of XTL's purported cancellation of the agreement, FPS had incurred engineering, manufacturing, labour and material costs in the course of partially manufacturing the freezer, including costs associated with stopping and restarting manufacturing work. Those parts of the freezer that were manufactured by FPS are unique in terms of size, shape and design, such that they could not be repurposed or otherwise used on other freezers. Such components were stored on the grounds of the FPS manufacturing facility and cannot be used to mitigate the losses incurred by FPS
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> [Emphasis added.]

[14] As I will discuss below in more detail, in affidavits filed with the Court and in examinations for discovery, FPS continued to represent that its set off claim included expenses incurred in manufacturing the Shelves.

[15] However, on Friday January 13, 2023, the last business day before the trial was to commence before Lamb J., counsel for FPS advised counsel for XTL of the following:

> After further investigation, it turns out that the shelving units for the XTL freezer were not discarded. They were, in fact, repurposed and FPS fully mitigated those losses. Therefore, we will no longer be seeking to include in the set off defence the cost of the materials and labour for the manufacture of the shelves. Attached is a spreadsheet recalculating the set-off claim at $487,140.04.
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> This changes one of the assumptions underlying the report of Robert Mackay concerning the amount of profit already received by FPS. Accordingly, attached is a revised Schedule 3 to his report with a recalculation based upon that changed assumption. The result is a reduction of lost gross profit (i.e. the amount still owing to FPS after taking into account the amounts already paid) from approximately $352,000 CAD to $172,000 CAD.

[16] At the application before me on costs, the parties agreed that the approximate cost of the Shelves removed from the set-off defence once it was discovered they

were repurposed was $180,000. As such, and again based on the submissions of counsel at the costs application before me, I understand that the total amount of the set off claim before the January 2023 trial was approximately $667,140 ($487,140 + $180,000).

[17] On January 16, 2023, the morning the trial was to commence before Lamb J., XTL applied for an adjournment on the basis of FPS's disclosure that the Shelves had not been discarded and had been repurposed thus not forming part of the set-off claim. The adjournment request was opposed by FPS. Justice Lamb granted the adjournment. In her oral reasons for judgment she held:

> [24] More generally, in my view, the adjournment request is reasonable when FPS withdrew one of the primary tenets of its set-off claim (that the parts it manufactured for XTL were scrapped) on the eve of trial. XTL is entitled to understand and investigate FPS' change in position.
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> [25] Further, based on the pleadings and discovery to date, XTL has prepared for different trial than the one that will apparently take place. It would be unfair to force XTL to proceed to trial in these circumstances.
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> [26] In my view, the adjournment request is timely in that XTL first learned of this change in direction after business hours on Friday. The history of this matter, including document disclosure over the course of this litigation, weighs in favour of an adjournment.
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> [27] As to prejudice, and prejudice to FPS is of its own making. Information that has now come to light was knowable by FPS had it done a timely and appropriate investigation of the set-off claim. In any event, FPS has not argued any prejudice.
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> [28] As a result, the trial is adjourned generally. XTL has asked that any costs that follow from this successful adjournment application be addressed at the conclusion of this matter. As a result, I am adjourning the issue of costs to the trial in this matter.

[18] The matter then proceeded to trial before me commencing in December 2023, as described above.

[19] I will now turn to the legal principles regarding the circumstances which can warrant an award of special or uplift costs.

III. Legal Principles

A. Special Costs

[20] The threshold for awarding special costs is set out in *Garcia v. Crestbrook Forest Industries Ltd.,* [1994] B.C.J. No. 2486, 1994 CanLII 2570 (C.A.), in which our Court of Appeal held:

> … it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke.

[10] In *SHH Holdings Limited v. Philip*, 2021 BCSC 1232, Justice Basran set out a variety of circumstances in which special costs may be ordered, including misleading or deceiving the court, giving false evidence under oath, or bringing a proceeding for an improper motive.

[21] Further articulation of circumstances in which special costs may be ordered was provided in *Mayer v. Osborne Contracting*, 2011 BCSC 914 at para. 11 in which the Court held that special costs may be ordered in circumstances which include the following:

> (a) Where a party pursues a meritless claim and is reckless with regard to the truth;
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> …
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> (d) Where a party makes the resolution of an issue far more difficult than it should have been; and
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> …
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> (i) Where a party pursues claims frivolously or without foundation.

[22] In respect of whether a failure to disclose documents can be seen as reckless thus deserving of rebuke, the Court in *Laface v. McWilliams*, 2005 BCSC 1766, at paras. 38 – 39 held:

> [38] … At worst, I can infer that there was a deliberate intention to suppress the evidence (including from the hotel's trial counsel). At best, it demonstrates foolhardy recklessness. In either case, it is the kind of reprehensible conduct that is deserving of reproof.

> [39] I conclude that this failure to disclose critical documents, standing alone, is deserving of an award of special costs against the hotel. Had this information (not just the private investigator reports) gone undisclosed, I have no doubt that the balance of probabilities would have favoured the hotel. Such non-disclosure simply cannot be condoned.

[23] As an alternative submission, XTL asks me to impose enhanced or uplift costs if I am not persuaded that the circumstances warrant awarding special costs. I will now turn to the legal principles related to uplift costs.

B. Uplift Costs

[24] The authority to grant uplift costs of 1.5 times the value of the scale that would otherwise apply to the cost award is established in the *Supreme Court Civil Rules* Appendix B, subsections 2(5) and (6):

> 2 (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) of (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding by 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).
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> (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[25] Justice Jackson provided a helpful summary of considerations regarding uplift costs in *Einboden v. Porter*, 2022 BCSC 1227 at paras. 13 and 14:

> [13] After fixing the appropriate scale of costs, the court may order that the value for each unit allowed for the proceeding, or any step in the proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale, if the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust: Appendix B, s. 2(5). This is referred to as "uplift costs" and is intended to indemnify the successful party where there are unusual circumstances: *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462 at para. 30.
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> [14] Misconduct can constitute an unusual circumstance justifying an award of uplift costs but the party asserting misconduct must establish "there was misconduct deserving of some form of rebuke, including disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence": *Shen* at para. 32, citing *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 57. An award of costs is not grossly inadequate or unjust merely because there is a difference between

> the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed: Appendix B, s. 2(6).

[26] There are two prerequisites before an increased costs order can be made. First, there must be unusual circumstances. Second, those unusual circumstances would result in a grossly inadequate or unjust award at the fixed rate: *BC (Director of Civil Forfeiture) v. Angel Acres Recreation*, 2021 BCSC 1574, para. 36.

[27] With these legal principles in mind, I now turn to my analysis and determination.

IV. Analysis

[28] From the commencement of the litigation through January 13, 2023, FPS maintained in its pleadings, in affidavits sworn by its representatives and at discovery that the Shelves could not be repurposed or otherwise used in other freezers. It further represented that these components that had been manufactured by FPS locally had deteriorated and had to be scrapped.

[29] The cost of the manufacture of the Shelves claimed by FPS as compared to its total set-off claim was significant. Indeed, before being removed from the set-off claim the cost of the Shelves represented approximately $180,000 of the $667,140 claim. This is approximately 27% of the total claim. I find because the value of the Shelves represented a significant portion of its set-off defence, it was important for FPS to make diligent efforts to ascertain the facts supporting its position.

[30] Further, while other components of the Freezer Project were manufactured in New Zealand, the manufacture and storage of the Shelves occurred entirely in British Columbia. I mention this detail because I find that it makes the failure of FPS to ascertain the true fate of the Shelves surprising and also demonstrates that these facts were exclusively within the knowledge of FPS as opposed to being relayed to FPS through its New Zealand affiliate FSL or other sources. Further, it was not a fact that XTL would be able to determine through its own diligence.

[31] An additional factor that makes the late discovery and disclosure of what had happened to the Shelves troubling is the evidence adduced at trial that prior to working on the Freezer Project for XTL, FPS had only worked on one similar type of large scale carton freezer: *Reasons* at para. 9. In my view, that FPS only had previously worked on one carton freezer before the XTL Freezer Project provides a reasonable inference that the manufacture of the Shelves would not be of such a routine or unremarkable nature that it would easily go unnoticed by FPS had they diligently inquired as to what had actually happened to the Shelves.

[32] Of significant concern to me is that a senior representative of FPS, Gladys Leung, swore an affidavit on January 3, 2020 in support of FPS's application to set aside a pre-judgment garnishing order that FPS had discarded the Shelves and they were a complete loss. At para. 45 of her affidavit, Ms. Leung deposes:

> At the time of XTL's purported cancellation of the agreement, FPS had incurred engineering, manufacturing, labour, and material costs in the course of partially manufacturing the freezer, including costs associated with stopping and restarting manufacturing work. Those parts of the freezer that were manufactured by FPS are unique in terms of size, shape, and design, such that they could not be repurposed or otherwise used in other freezers. Such components were stored on the grounds of the FPS manufacturing facility and could not be used for other applications.

[33] I note that the language of Ms. Leung's affidavit mirrors the portion of FPS's Response to Civil Claim regarding its loss related to the Shelves. In my view, this demonstrates that FPS had taken a position at the time of filing its pleading and not diligently made any additional efforts to ascertain what had occurred regarding the Shelves at the time Ms. Leung swore her affidavit.

[34] Of greater concern to me is that the Vice President of Sales and Marketing and one of the founders of FPS, Justin Lai, attended at examinations for discovery on February 1, 2021, and continued to represent that the costs incurred in manufacturing the Shelves was unrecoverable. In the discovery, Mr. Lai deposed that the shelving components were scrapped because they were not usable as a result of, "the weather. So some of the components had corroded after many years,

and so they were not applicable for other equipment". I find this statement particularly troubling because it is detailed and particular and provides a specific narrative as to why the Shelves were not salvageable. The detail of the weather corroding some of the components is concerning because it is both specific and false.

[35] XTL contends that Mr. Lai's evidence regarding the Shelves in the discovery is made all the more egregious because documents indicate that that as of April 2019, he was involved in communications which appears to show that Shelves had not been disposed and were "reusable". I do not have sufficient facts before me to make an assessment as to whether Mr. Lai's misstatement of the evidence at discovery is misinformed or purposeful. However, Mr. Lai is a senior executive and founder of FPS. He was nominated as the representative to be examined on behalf of FPS. Whether his evidence at discovery is intentionally misleading or innocent, it still demonstrates that FPS has been reckless with the facts. I find this unacceptable especially at a point in time over a year and half after FPS had filed its Response to Civil Claim and was well into the litigation.

[36] For over almost two years after Mr. Lai's examination for discovery, FPS maintained its position that the Shelves it had manufactured for XTL on the Freezer Project were specialized and could not be used for any other projects. That this information was false was only disclosed on the afternoon of January 13, 2023, on the eve of trial.

[37] I am troubled by FPS's repeated assertion in this litigation that the Shelves could not be repurposed. The amount of the Shelves was significant as compared to the claim in both dollar value as well as the foundation of the litigation. In my view, the repeated erroneous statements that the Shelves were not repurposed and had to be discarded put the litigation on the wrong footing for XTL to understand the case it had to meet.

[38] I accept that information believed to be the facts when set out in pleadings may be subject to change as a party learns more about its case. It is not

unreasonable that a party, as litigation moves forward, better understands with specificity the case it argues and details crystalize. However, at a certain point, especially if a party is providing sworn evidence in an affidavit or during a discovery, a party must be diligent to ensure that the facts it asserts are accurate. To do otherwise is either intentionally deceitful and strategic to gain an advantage or is reckless. While it is a case-specific assessment of whether these actions will attract costs sanctions, in my view, the actions of FPS are worthy of rebuke and thus warrant enhanced costs.

[39] To reiterate, I am concerned that Ms. Leung swore and affidavit that incorrectly stated that the Shelves were not repurposed. Her affidavit was not made on information and belief and was used by FPS in an application to set aside a garnishing order. However, while I have considered imposing costs from the date that Ms. Leung swore her affidavit, in my view, she is not sufficiently senior in the organization and may not have had the ability to ascertain what happened to the Shelves. Further, her affidavit was sworn in support of an application that occurred relatively early in the litigation such that FPS may still have been gathering information. This is not to excuse her apparently false affidavit, but to explain it.

[40] Affiants, parties and counsel must be diligent when putting affidavit evidence before the Court to ensure that it is accurate. A crucial element of the proper functioning of the administration of justice is the Court's ability to rely upon affidavit evidence as truthful and accurate.

[41] The same reasons explaining Ms. Leung's false affidavit do not apply to Mr. Lai's testimony at the examination for discovery. As set out above, he provided what turned out to be a detailed, but false, narrative regarding the fate of the Shelves. Given his role as the representative of FPS at the discovery, and his senior role in the organization, FPS should have known that the Shelves had been repurposed by the discovery, or it they did not, an untrue narrative should not have been provided.

[42] Put simply, it is one thing to represent in pleadings the understanding of the losses believed to be suffered. It is another, and more serious, issue to, in the case of Ms. Leung's affidavit, depose in a document put before the Court to gain an advantage, and in the case of Mr. Lai's discovery repeat that falsity while under oath. This is especially so because that fact is only within the knowledge of FPS. Further, as set out above, the value of the Shelves as well as their importance to FPS in manufacturing them lead me to believe that they were of such significance that FPS knew, or should have known if the Shelves were repurposed, thus mitigating its losses and changing the landscape of the litigation.

[43] While I conclude that the actions of FPS misrepresenting whether the Shelves had been repurposed at Mr. Lai's discovery reckless, I do not find that the actions amount to scandalous or outrageous conduct (or the lesser forms of poor conduct) that warrant special costs. I accept that the litigation proceeded, such that the misrepresentation would not have changed the necessity for the litigation to continue. As such, the misrepresentations regarding the Shelves did not result in a completely unnecessary litigation. As such, XTL should not be indemnified for all of its legal expenses because it was required to continue the litigation even without the issue of the Shelves. Further, XTL was not entirely successful at trial in minimizing FPS's set-off claim. Accordingly, I find that the actions of FPS do not warrant an award of special costs and decline to make such an order.

[44] However, I am persuaded that uplift costs are warranted in this case. In my view, the circumstances of this case are unusual such that the standard amount of costs is not appropriate. I conclude that the awarding of regular costs under the tariff would be grossly inadequate and unjust.

[45] As set out above, I conclude that FPS was reckless, made false (or at least inaccurate) statements under oath repeatedly – in affidavits and on discovery. This conduct merits an award of uplift costs. I accept that it is unjust for XTL in the circumstances of this case to be awarded costs at Scale B. XTL was put to extra and

unnecessary time and expense directly related to FPS's reckless conduct in not providing truthful information during the litigation.

[46] In terms of the duration, I am not in agreement with XTL that the uplift costs should commence at the commencement of the proceedings. As outlined above, in my view, it is not unreasonable that a party may come to a better understanding of the facts after it has filed its pleading. I conclude that it is appropriate to award XTL uplift costs from the date of Mr. Lai's discovery, being February 1, 2021, to the date of the adjournment application before Lamb J., January 16, 2023.

[47] I find that Lamb J. was apt in her description of how the circumstances of the litigation significantly changed when FPS disclosed that the Shelves had been repurposed. Lamb J. held at para. 25 that, "based on the pleadings and discovery to date, XTL has prepared for a different trial than the one that will apparently take place." I find that XTL's focus of the litigation would be through the lens of the falsity of FPS's representation that the Shelves could not be repurposed. While impossible to know what difference proper and timely disclosure of this fact would have had to the litigation, In my opinion the continued misrepresentation by FPS regarding the Shelves put the litigation on an improper footing thus denying XTL from making its decisions knowing the full set of facts. In this regard, I also agree with counsel for XTL that even if there was no monetary consequence to XTL from the failure to disclose, it is the reckless or willful conduct of FPS in not conducting adequate searches and disclosing information central to the litigation that is worthy of rebuke.

[48] Litigants must prepare for litigation diligently and ensure that if they are to rely upon facts relevant to the matters in issue, they are both diligent in uncovering the facts and are accurate and careful in describing and disclosing those facts to the opposing party and the Court. In this case, I conclude that FPS was reckless both with its diligence to investigate a fact that was solely within its knowledge and also with its presentation of those facts which were important to the litigation. While not rising to egregious conduct, it warrants rebuke and reproof and should be denounced by the Court.

V. Conclusion

[49] Given the foregoing, I order that FPS is required to pay uplift costs between the dates of February 1, 2021 to January 16, 2023, which includes the adjournment application before Lamb J., to be assessed at 1.5 times Scale B. If there are issues in calculating the amount of costs, the parties have leave to refer the matter to the Registrar.

[50] Further, XTL is awarded costs of this application at Scale B.

[51] I thank counsel for their written and oral submissions.

"Gibb-Carsley J."