Date: 20240822
Docket: CI 18-01-16438
(Winnipeg Centre)
Indexed as: 5750351 Manitoba Ltd. et al. v. Lake St. Martin First Nations
Cited as: 2024 MBKB 125

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

5750351 MANITOBA LTD.,	)	
4711824 MANITOBA LTD., RUSS KNIGHT,	)	David G. Hill
HUDSON BAY TRADERS LTD. and	)	For the plaintiff
10046552 MANITOBA LTD.,	)	10046552 Manitoba Ltd.
	)	
plaintiffs,	)	Russ Knight
	)	On his own behalf
- and -	)	For all other plaintiffs
	)	
LAKE ST. MARTIN FIRST NATIONS,	)	
	)	Bradley D. Regehr, K.C.
respondent.	)	Anjalika N. Rogers
	)	For the respondent
	)	
	)	Judgment Delivered:
	)	August 22, 2024

REMPEL J.

ISSUE

[1] This motion raises the issue of costs in response to misconduct by a litigant during the course of litigation. Security for costs and costs thrown away following an adjournment are also at issue.

[2] The misconduct in this case involves a litigant making tactical decisions that made mockery of the principal of proportionality, that is enshrined in the ***Court of King's Bench Rules***, M.R. 553/88, rules 1.04(1) and (1.1) (the "Rules"):

INTERPRETATION	PRINCIPES D'INTERPRÉTATION
General principle	Principe général
1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.	**1.04(1)** Les présentes règles doivent recevoir une interprétation large afin que soit assurée la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse.
Proportionality	Proportionnalité
1.04(1.1) In applying these rules in a proceeding, the court is to make orders and give directions that are proportionate to the following: (a) the nature of the proceeding; (b) the amount that is probably at issue in the proceeding; (c) the complexity of the issues involved in the proceeding; (d) the likely expense of the proceeding to the parties.	**1.04(1.1)** Lorsqu'il applique les présentes règles dans le cadre d'une instance, le tribunal rend des ordonnances et donne des directives qui sont proportionnées : a) à la nature de l'instance; b) au montant probablement en litige; c) au degré de complexité des questions en litige; d) au coût probable de l'instance pour les parties.

[3] In this case the win-at-all-costs strategy employed by the litigant achieved a process contrary to the spirit and the letter of the Rules, which became needlessly complex and unduly expensive. The misconduct in this case deserves to be sanctioned through an order for costs.

CHRONOLOGY OF THE LITIGATION

[4] This is a consolidated action of two files, namely CI 18-01-16438 and CI 22-01-37611, regarding lease payments allegedly owing by the defendant Lake St. Martin First Nations ("LSM") for a partially remodeled school building located at 1970 Ness Avenue (the "Ness Property") and unpaid rents at 519 Burnell Street (the "Burnell Property"). The plaintiffs also seek reimbursement for alleged equity that was lost when the Burnell Property was foreclosed upon. The Ness Property is owned by 10046552 Manitoba Ltd. ("1004"). The Burnell Property was owned or controlled by the remaining plaintiffs, namely by 5750351 Manitoba Ltd. ("575"), 4711824 Manitoba Ltd. ("471"), Russ Knight ("Mr. Knight") and Hudson Bay Traders Ltd. ("Hudson Bay Traders").

[5] On January 8, 2024 a trial scheduled for seven days commenced before me. Mr. Hill was counsel for all of the plaintiffs at that time. On the first day of trial Mr. Hill completed the direct examination of Mr. Knight and later that same afternoon Mr. Regehr, counsel for LSM, started his cross-examination. Things went off the rails during the cross-examination when Mr. Knight admitted that he had failed to disclose relevant documents to LSM when his affidavit of documents was produced in 2019.

[6] The documents in question were important to Mr. Knight and he claimed to have reviewed them a few weeks earlier in preparation for trial. The documents were so important in fact that Mr. Knight even brought them to court in his briefcase on the first day of trial.

[7] I adjourned the trial to allow counsel for LSM to review the undisclosed documents which included numerous rent rolls for the Burnell Property, 83 signed tenancy

agreements and numerous rental unit condition reports. Mr. Knight indicated he had come across these documents by accident in early December of 2023 and he advised Mr. Hill of their existence. No notice of this allegedly accidental discovery was conveyed to counsel for LSM prior to the start of trial.

[8] None of the tenancy agreements showed LSM as a tenant or contained language that obligated LSM to assume responsibility for rental payments, which is a key part of the plaintiffs' case against LSM.

[9] On the morning of the second day of trial, I adjourned the trial for one further day to give LSM's counsel the opportunity to photocopy and review the undisclosed documents. When the trial reconvened on the third day LSM's counsel advised me that Dewar J. had issued an Order in King's Bench File No. CI 15-01-97928 (the "Dewar Order"), involving a secured lender on the Burnell Property, Cameron Stephens Financial Corporation (the "Secured Lender") and 5448124 Manitoba Ltd., which is a corporation controlled by Mr. Knight and his wife.

[10] The Dewar Order explicitly precluded any litigation with respect to the Burnell Property without notice or the consent of the Receiver, which Mr. Hill admitted had not been sought or obtained. Mr. Hill further indicated that the Secured Lender had not been served with notice that this matter was proceeding to trial and took the position that the Dewar Order was no longer enforceable.

[11] Armed with this new information LSM brought a motion to adjourn the trial due to the failure of Mr. Knight and his corporations to disclose relevant documents as required by the Rules and the breach of the Dewar Order that required notice to be given to the Receiver. I granted the motion to adjourn the trial without a fixed date as requested by

LSM and ordered that the lawyers for the Secured Lender and the Receiver of the Burnell Property be served with the order to adjourn and that a mid-trial conference should be scheduled at a mutually agreeable date.

[12] Before the trial was adjourned counsel for LSM indicated for the record that LSM would be seeking throwaway costs for the trial and other relief. The motion for costs was eventually heard on June 21, 2024. Shortly before the hearing of that motion, Mr. Hill brought a motion to withdraw as counsel for Mr. Knight and his corporations, but remain as counsel of record for 1004. LSM took no position on Mr. Hill's motion to withdraw. I granted it accordingly.

THE MID-TRIAL CONFERENCES

[13] Despite the assurances of Mr. Hill that the Dewar Order was no longer in force, I insisted that counsel for the Secured Lender and the Receiver (Grant Thornton Ltd.) be served with the notice of the first mid- trial conference.

[14] The Receiver did not appear at the March 4, 2024, mid-trial conference, but counsel for the Receiver issued a letter confirming that its consent was not sought by Mr. Knight or his related corporations with respect to the action commenced against LSM with respect to the Burnell Property as required by the Dewar Order.

[15] At a further mid-trial conference on March 8, 2024 counsel for the Secured Lender advised that a discharge of the Dewar Order had just been filed and it was no longer in effect, but the Secured Lender was still maintaining its priority claim with respect to any damages that might be payable to Mr. Knight or his related corporations with respect to unpaid rents pertaining to the Burnell Property.

[16] I was also advised at the mid-trial conference by counsel for LSM that Mr. Knight and various corporate entities that he controlled had breached the Practice Direction of this court issued on June 23, 2023, entitled "Tracking of Related Files". The gist of this Practice Direction is that litigants must disclose the existence of any other lawsuits that are related to the action that is proceeding to trial.

[17] Counsel for LSM confirmed that Mr. Knight is involved in several lawsuits directly related to this litigation, which include claims for substantially the same relief that the plaintiffs are seeking against LSM in the two actions before me. Mr. Knight as a plaintiff in both CI 21-01-33821 and CI 21-01-33788 makes allegations of forgery with respect to the mortgage documents of the Burnell Property and the fraudulent amendment of the mortgage agreement, resulting in a loss of equity in the Burnell Property of over $13 million. Summary judgment was awarded in both of these actions in favor of the defendants and the notices of appeal in both matters were struck by the Manitoba Court of Appeal. The existence of these claims were never disclosed to me or counsel for LSM during the pre-trial process.

[18] On May 22, 2024, Justice Toews issued an Endorsement (the "Toews Endorsement") with respect to three separate statements of claim filed by Mr. Knight and his wife which attacked the validity of the mortgage debt held by a lender against real property they held an interest in. The actions were filed as King's Bench file numbers CI 23-01-43864, CI 23-01-43865 and CI 24-01-44710.

[19] Those three statements of claim included allegations that the signatures of Mr. Knight and his wife on a mortgage had been forged and that the mortgage lender had acted in bad faith. These allegations gave rise to an argument by Mr. Knight and his

wife that the equity they held in a property via one of their corporations had been lost. The Toews Endorsement confirms that Mr. Knight commenced at least seven other claims in either this court or the Manitoba Court of Appeal with respect to the allegations raised in the statements of claim.

[20] Toews J. ultimately concluded that the actions commenced by Mr. Knight and his wife were frivolous and vexatious and should be struck. Further, Toews J. made a finding that Mr. Knight and his wife were vexatious litigants, and they could not take further actions against the defendants in the three actions. (See para 26 of the Toews Endorsement.)

[21] The findings of Toews J. as to unpaid awards as to costs against Mr. Knight and his wife and their corporate entities in four separate actions are also the subject of comment in the Toews Endorsement at paras. 21 and 22 and are apposite to this case:

> [21] As pointed out by the defendants, the plaintiffs have failed or refused to pay prior costs awards. They state that this failure demonstrates a disregard of prior court orders, including orders that were consented to by the plaintiffs. More importantly, in my opinion this failure indicates that the defendants will have difficulty collecting any outstanding cost awards, as well as the cost awards which I will order in respect of this motion. I agree that it would be unjust for the defendants to incur further costs to defend similar proceedings, given the plaintiffs' unwillingness to satisfy the order for costs made by this court and the Court of Appeal.
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> [22] In addition to the foregoing conclusions, I am also of the opinion that the plaintiffs in this matter should be designated vexatious litigants. While it is important for the court to exercise caution when fettering access to the courts, the continued and repetitive attempts by the plaintiffs to commence proceedings against the defendants in this case constitutes vexatious conduct and therefore the plaintiffs should be subject to a vexatious litigant order.

[22] Further research by LSM shows that Mr. Knight and/or his corporate entities have had final judgments ordered against them in several other unrelated actions in this court,

including CI 16-01-000001, CI 16-01-04467, CI 18-01-12415 and CI 18-01-12999. There is no evidence that these judgments or any awards for costs have been satisfied by Mr. Knight. I will highlight many other statements of claim involving Mr. Knight later in these reasons, which demonstrate that he is a serial litigant in this court.

FIRST PRINCIPLES AS TO COSTS

[23] Awarding costs involves the exercise of discretion on the part the judge who ultimately rules on the matter in dispute. Although the discretion of a judge in Manitoba as to an award for costs under s. 96 of ***The Court of King's Bench Act***, C.C.S.M. c. C280 (the "***Act***"), is a broad one, it is still circumscribed by the discretionary factors set out in King's Bench Rule 57.01 and the appellate authorities. (See ***Bibeau et al. v. Chartier et al.***, 2022 MBCA 2, at paras. 51 and 88.)

[24] King's Bench Rule 57.01(1) provides:

GENERAL PRINCIPLES	PRINCIPES GÉNÉRAUX
Factors in discretion	**Pouvoir discrétionnaire du tribunal**
57.01(1) In exercising its discretion under section 96 of *The Court of King's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,	**57.01(1)** Dans l'exercice du pouvoir discrétionnaire d'adjudication des dépens que lui confère l'article 96 de la *Loi sur la Cour du Banc du Roi*, le tribunal peut prendre en considération, outre le résultat de l'instance et une offre de transaction présentée par écrit :
(a) the amount claimed and the amount recovered in the proceeding;	a) le montant demandé dans l'instance et le montant obtenu;
(b) the complexity of the proceeding;	b) le degré de complexité de l'instance;
(c) the importance of the issues;	c) l'importance des questions en litige;
(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;	d) la conduite d'une partie qui a eu pour effet d'abréger ou de

(d.1) the conduct of any party which unnecessarily complicated the proceeding;	d.1) a conduite d'une partie qui a compliqué l'instance inutilement;
(d.2) the failure of a party to meet a filing deadline;	d.2) le défaut d'une partie de déposer un document dans le délai imparti;
(e) whether any step in the proceeding was improper, vexatious or unnecessary;	e) une mesure prise dans l'instance qui était irrégulière, vexatoire ou inutile;
(f) a party's denial or refusal to admit anything which should have been admitted;	f) la dénégation, par une partie, d'un fait qui aurait dû être reconnu ou son refus de reconnaître un tel fait;
(f.1) the relative success of a party on one or more issues in a proceeding in relation to all matters put in issue by that party;	f.1) le fait qu'une partie ait eu gain de cause à l'égard d'une ou plusieurs questions en litige dans une instance compte tenu de l'ensemble des questions qu'elle a soulevées;
(g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and	g) l'opportunité de condamner aux dépens d'une ou de plusieurs instances, s'il y a plusieurs parties qui ont des intérêts identiques et qui sont représentées inutilement par plus d'un avocat;
(h) any other matter relevant to the question of costs.	h) les autres facteurs pertinents à la question des dépens.

SOLICITOR-AND-CLIENT COSTS

[25] The general test for an award of solicitor-client costs is set out by the Supreme Court of Canada in ***Young v. Young***, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, where it was held that "*solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs*" (at p. 134).

[26] The Manitoba Court of Appeal found in ***Fouillard v. Ellice (Rural Municipality)***, 2007 MBCA 108, 220 Man. R. (2d), that conduct triggering an award of solicitor-client costs at common law was limited to "*rare and exceptional circumstances where the conduct of the other party is unconscionable*" (citations omitted). *It is definitely not the practice to award costs, even party and party costs, to an unsuccessful party in the absence of misconduct*" (at para. 55).

[27] In ***West v. West***, 2007 MBCA 62, [2007] M.J. No. 134 (QL), the Manitoba Court of Appeal cited the ***Young*** decision from the Supreme Court of Canada with approval and concluded that a lack of merit alone could not form the basis of an award of solicitor-client costs. "*There must be something more*" (para. 4).

[28] ***Nash v. Nash***, 2019 MBCA 31, teaches that there is a high threshold for solicitor-and-client costs in Manitoba and sets out the policy reasons in support of this conclusion at para. 44:

> [44] However, there are other principles from the case law (beyond the general statements of the law referred to by the motion judge) relevant to awarding solicitor-and-client costs, including:
>
> - Solicitor-and-client costs are generally intended to censure behaviour related to the conduct of the litigation alone and not to the conduct which might have been the subject of punitive damages (see *Norberg v Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 SCR 226 at 317 (per Sopinka J, dissenting but not on this point); and *Siemens v Bawolin*, 2002 SKCA 84 at para 118).
>
> - A defendant is entitled to defend an action and to put a plaintiff to the proof of his case. There is no obligation to settle an action. The fact that the issue of liability is not contested at trial or the defendant does not give evidence should not in itself result in an award of solicitor-and-client costs (see *Gerula v Flores* (1995), 1995 CanLII 1096 (ON CA), 126 DLR (4th) 506 at 528-29 (Ont CA); and *Hunt v TD Securities Inc* (2003), 2003 CanLII 3649 (ON CA), 229 DLR (4th) 609 at paras 133, 153 (Ont CA)).

- Proper grounds for the award of solicitor-and-client costs would arise where the defendant's acts are a deliberate attempt to frustrate the proceedings by fraud or deception or where the conduct is calculated to harm the plaintiff (see *Gerula* at pp 528-29; and *Hunt* at para 133).

[29] The decision of the Manitoba Court of Appeal in ***Bibeau*** regarding awards for solicitor-and-client costs addresses the "*reprehensible, scandalous or outrageous conduct*" standard described in ***Young***. ***Bibeau*** teaches at para. 102 that a "*weak claim*" involving "*unproven allegations made recklessly without any foundation whatsoever can support an award of solicitor-and-client costs*" and the same could be said of a claim "*so utterly without hope that it amounts to misconduct or an abuse of process deserving of rebuke*" or a claim that improperly and unnecessarily names a defendant contrary to King's Bench Rule 57.01(1)(e).

[30] In ***College of Registered Nurses of Manitoba v. Hancock***, 2023 MBCA 94, the Manitoba Court of Appeal addresses misconduct by a vexatious litigant during the course of litigation that forced an opposing party to endure significant legal expenses in a matter that was made onerously and needlessly complex, at paras. 54-55:

> [54] The respondent makes the following compelling submission: "A hallmark of vexatious litigants is the incredible expense they cause the responding parties to endure. The Respondent has endured significant legal costs due to the Appellant's conduct before this court and the courts below."
>
> [55] In our view, this is one of those rare cases where it is appropriate to award solicitor and client costs in favour of the respondent on the motion to express disapproval with the appellant's conduct of this litigation.

[31] Generally, an award of solicitor-and-client costs is reserved for a party's conduct during the course of litigation as opposed to pre-litigation conduct. (See

Judges of the Provincial Court (Man.) v. Manitoba et al., 2013 MBCA 74, at para. 173.)

[32] In ***Judges***, the Manitoba Court of Appeal has found that solicitor-client costs do not require a finding of bad faith. "Reprehensible, scandalous, or outrageous" constitutes three discrete types of conduct, any of which can ground an order for solicitor-client costs (at para. 165). The standard for reprehensible behaviour is conduct which is "deserving of reproof or rebuke" is set out in Judges at paras. 180-181:

> [180] What is meant by the phrase "reprehensible conduct"? To found an order of solicitor-client costs, a finding of bad faith is not necessary. As we have seen, it is sufficient to find reprehensible conduct. Quoting and relying on the case of *Newfoundland Association of Provincial Court Judges et al. v. Newfoundland*, the application judge adopted the definition of "reprehensible" as one that has a wide meaning. I agree with the application judge on that point.
>
> [181] To be more exact, courts have held that the phrase "reprehensible, scandalous or outrageous conduct" (at p. 134) as used by McLachlin J. in *Young* refers to three separate standards of objectionable conduct given the use of the word "or" as opposed to "and" (see *Garcia v. Crestbrook Forest Industries Ltd. (No. 2)* (1994), 1994 CanLII 2570 (BC CA), 45 B.C.A.C. 222 at para. 13. Specifically, with reference to the word "reprehensible," courts have adopted the definition of the phrase used by Esson C.J.S.C. in *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314, where he stated (at para. 5):
>
> > …. But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".
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> (See also *Cabaniss v. Cabaniss*, 2010 BCCA 348 at para. 74, 290 B.C.A.C. 135, and *Lienaux et al. v. Toronto-Dominion Bank* (1997), 1997 CanLII 14986 (NS CA), 159 N.S.R. (2d) 305 (C.A.).)

[33] Outrageous conduct by a litigant that includes a total disregard for discovery obligations contained in the Rules and needlessly drives up costs to the opposing side is deserving of rebuke through an award of solicitor-client costs. That kind of behaviour violates the principle of proportionality and justifies an award of solicitor-client costs. The

Manitoba Court of Appeal underscores this in ***Winnipeg (City) v. Sheegl***, 2023 MBCA 63, at para. 138:

> [138] The City has been entirely successful in resisting the appeal. Moreover, the appeal by the Sheegl defendants raises no point of substance and has little merit. However, the key fact, in combination with the result and the lack of merit to the appeal, that makes this case exceptional for costs purposes is the scale of costs granted in the Court below due to Sheegl's attempt to cover up his illegal conduct during the litigation and his total disregard of his obligations during the discovery process and the implications of that conduct to the proportionality of this litigation.

THE MOTIONS BEFORE ME

[34] LSM is seeking the following relief in its notice of motion with respect to costs:

a) That Mr. Knight and his related companies pay an award for costs that I ordered be payable in the cause, but in any event of the cause on October 5, 2023, after LSM successfully defeated a motion to enforce an alleged settlement agreement;

b) That Mr. Knight and his related companies pay for costs thrown away on a solicitor-client basis as a result of the adjournment of the trial on January 10, 2024;

c) That all plaintiffs be ordered to pay security for costs with respect to the trial before it reconvenes;

d) That all plaintiffs pay for the cost of this motion on a solicitor-client basis; and

e) That the plaintiffs be prohibited from continuing with this action or face the striking of their claims, if they fail to comply with any cost orders that may be made if LSM is successful in obtaining any of the relief noted above.

[35] I will address these motions in the order they were raised.

THE COSTS OF OCTOBER 5, 2023

[36] On October 5, 2023, I heard a motion brought by 575, 471, Mr. Knight and Hudson Bay Traders to enforce a settlement agreement against LSM. I dismissed that motion by way of an Endorsement dated October 5, 2023 and ordered Mr. Knight and the other named plaintiffs in that motion to pay LSM's costs in the cause, but in any event of the cause. The motion was without merit and had no chance of success, but my hope was that my decision to make the costs payable in any event of the cause would encourage settlement discussions between the parties.

[37] The plaintiffs did not take issue with how LSM calculated the costs plus disbursements to amount to $8,841.93.

[38] I am satisfied that the plaintiffs named in that motion should pay those costs forthwith, as the adjournment of the trial dates were entirely due to their misconduct that I will detail later in these reasons. But for this misconduct of the plaintiffs the trial would have been concluded by now and LSM would have been entitled to payment of those costs regardless of the outcome of the litigation. Ergo I am satisfied that LSM should receive those costs immediately.

[39] As I will detail later, I am also persuaded that LSM should receive the October 2023 costs forthwith because I am satisfied that 575, 471, Mr. Knight and Hudson Bay Traders will be unwilling or unable to pay the costs of this motion following the trial of this action, as they are serial litigants in this court with a demonstrated track record of not paying any of the costs that have been awarded against them in the past. Mr. Knight in particular has been found to be a vexatious litigant in this court who has repeatedly

refused to pay costs awarded against him and as such he is not entitled to the benefit of a doubt with respect to the potential payment of this award of costs.

[40] For these reasons I am satisfied that it is in the interests of justice that the plaintiffs in that motion pay the costs of the motion to LSM forthwith and that they be prohibited from taking any further steps in this action until these costs and disbursements have been paid in full to the LSM.

THROWAWAY COSTS RESULTING FROM THE ADJOURNMENT OF THE TRIAL IN JANUARY OF 2024

[41] In ***TDL Group (The) v. Zabco Holdings Inc. et al.***, 2007 MBQB 303, 224 Man. R. (2d) 23, this court stated at para. 35 that the purpose of an order for throwaway costs "*is to ensure that one party does not put the other party to unnecessary expense through no fault of that other party by causing an adjournment of the trial at a late date, after the other party had incurred trial preparation expenses that cannot be recouped later*."

[42] In ***TDL Group***, the plaintiff sought throwaway costs for the adjournment of the trial due to the defendant's failure to properly answer undertakings given on discovery which impeded the plaintiff's trial preparation. Notably, the court found that "*it would be unfair to [the plaintiff] to face new facts on the eve of the trial when it would not have sufficient time to search its records for any information that it might have to either support or refute the assertions of those witnesses or to have its expert review the information and comment on it*" (at para. 10).

[43] A finding was made in ***TDL Group*** that the trial preparation costs could be subdivided into costs for work that will be useful for trial whenever it occurs and costs for

work that will have to be repeated (at para. 24). With respect to the first category, the court discounted the costs by 50 per cent. The second category, however, constituted costs "*thrown away and that the fault for this must be laid squarely at the feet of counsel for the defendants*". Accordingly, the court ordered that those costs must be paid to the plaintiff on a full-indemnity basis (at para. 29).

[44] LSM also argues that that it is a general rule that if a party is responsible for an adjournment of a trial for any reason, an award of costs against that party inevitably follows. Monnin C.J.Q.B. (as he then was) in ***Telecommunication Employees Association of Manitoba Inc. et al. v. Manitoba Telecom Services Inc. et al.***, 2010 MBQB 13, stated at paras. 20 and 21:

> [20] The plaintiffs seek to be compensated for their costs thrown away as a result of the adjournment. They seek them on a solicitor and client scale, namely, a full indemnity for the steps which were "reasonably necessary to proceed with the action but which [were] rendered useless by the other party's conduct in responding or not responding to the action" – per Steel J. in Royal Bank of Canada v. Blatt, [1991] O.J. No. 688 (QL).
>
> [21] Throw-away costs are also referred to as "costs of the day". Where the adjournment of trial is occasioned by the default of a party, then costs against that party would normally follow, although they are not as of right. (See Mark M. Orkin, The Law of Costs, 2d ed. (Aurora: Canada Law Book, 2003) at 2-307 and 2-308.)

[45] Ultimately the decision in ***Telecommunication Employees*** did not order solicitor-client costs to the party responsible for the costs thrown away as it "*was not a situation where the defendants' conduct is so egregious as to award costs on a full indemnity*" (at para. 34). A finding was also made that not all efforts going into the preparation of witnesses was lost in that case (at para. 35).

[46] LSM seeks throwaway costs on a solicitor-client basis due to the adjournment of the trial on January 10, 2024. In the main LSM argues that the adjournment of the trial was entirely due to the actions of Mr. Knight, who failed to disclose relevant documents to LSM in advance of the trial and also that they failed to obtain the consent of the Receiver or leave of the court prior to commencing the litigation as required by the Dewar Order. At trial, neither Mr. Knight nor his counsel offered any kind of explanation or justification for their conduct which caused the loss of trial dates and they did not dispute LSM's calculations that the solicitor-client costs of LSM amount to $88,340.87 inclusive of disbursements.

[47] In this case Mr. Knight admitted in cross-examination that he had "*all of the leases*" for the tenants that resided at the Burnell Property with him in a briefcase he brought into the courtroom on the first day of trial. The reason Mr. Knight offered in response to the question as to why these documents had not been disclosed is that he stumbled upon them in December of 2023 as he was preparing for trial and he advised Mr. Hill about this at the time. It is undisputed that the documents were never disclosed or provided to LSM or its counsel.

[48] During argument as to the merits of LSM's request to adjourn the trial which occurred on the third day of the trial, LSM's counsel also confirmed the existence of the Dewar Order, appointing the Receiver with respect to the Burnell Property. As I have already noted I granted the adjournment as a matter of trial fairness due to the lack of disclosure and the blatant breach of the Dewar Order which required the consent of the Receiver or leave of the court to bring any action related to the Burnell Property.

[49] At the mid-trial conferences LSM confirmed that it had discovered that Mr. Knight, 575 or entities he controlled were involved in many files in this court where judgment had been granted against him. These actions include:

a) CI 15-01-98487 – Cameron Stephens Financial Corporation v. Russell Edward Knight and Susannah Carol Simes ("Ms. Simes") – judgment granted against Mr. Knight and Ms. Simes on January 30, 2020;

b) CI 16-01-00001 – Crossroads–DMD Mortgage Investment Corporation v. 5376115 Manitoba Ltd. et al. – involving foreclosure proceedings of a property at 508 Sherbrook Street in Winnipeg and the Ness Property. Default judgment was obtained against 575 and Mr. Knight on March 21, 2016;

c) CI 16-01-04467 – McMunn & Yates Building Supplies (Lumber) Ltd. v. Hudson Bay Traders Ltd. et al. – Default judgment granted against Hudson Bay Traders on November 29, 2016;

d) CI 17-01-10247 – 5750351 Manitoba Ltd. v. Sigmar Mortgage Services Ltd. ("Sigmar") – relates to an attempt by 575 to stop the mortgage sale of the Ness Property. The notice of application was struck on September 25, 2017 and costs were awarded to Sigmar;

e) CI 18-01-12415 – David Horne v. Kenneth Rene Carroll, Russell Edward Knight and 6064630 Manitoba Ltd. – Default judgment granted against all defendants, including Mr. Knight, on February 26, 2018;

f) CI 18-01-12999 – Diverso Energy Inc. v. 5750351 Manitoba Ltd. – relates to an action brought by Diverso Energy Inc. against 575 for unpaid accounts in

the amount of $574,600.17 for the installation of a geothermal system at the Ness Property. Default judgment was noted on September 10, 2018;

g) CI 21-01-33821 – Russell Edward Knight and Susannah Carol Simes v. Cameron Stephens Financial Corporation and Peter Ginakes – relates to the purported fraud and forgery of documents in relation to the mortgage on the Burnell Property by Mr. Knight and Ms. Simes as I have already mentioned in these reasons. Summary judgment was granted against Mr. Knight and Ms. Simes on April 11, 2023. Mr. Knight's and Ms. Simes' notice of appeal of the dismissal of their claim (AI 23-30-09954) was struck by the Court of Appeal on October 31, 2023 due to Mr. Knight's and Ms. Simes' failure to comply with a security for costs order;

h) CI 21-01-33788 – Russell Edward Knight and Susannah Carol Simes v. D'arcy & Deacon LLP – also relates the filing of a purported fraudulent amendment agreement in relation to the mortgage on the Burnell Property and seeks damages for Mr. Knight's and Ms. Simes' lost equity in the property in the amount of $13.5 million as previously described in these reasons. Summary judgment was granted against Mr. Knight and Ms. Simes on April 11, 2023. Mr. Knight's and Ms. Simes' notice of appeal of the dismissal of their claim (AI 23-30-09953) was struck by the Court of Appeal on October 31, 2023 due to Mr. Knight's and Ms. Simes' failure to comply with a security for costs order;

i) CI 23-01-43864 – Russell Edward Knight and Susannah Carol Simes v. Stephen Cameron – relates the defendant's allegedly racist comments to a potential joint venture partner in which Mr. Knight and Ms. Simes seek damages for lost

equity in the Burnell Property in the amount of $13.5 million. The defendant brought a motion to strike and to have Mr. Knight and Ms. Simes declared vexatious litigants was granted by Toews J. as already noted;

j) CI 23-01-43865 – Russell Edward Knight and Susannah Carol Simes v. Dickinson Wright LLP – relates the purported forgery of a syndication waiver and also seeks damages for Mr. Knight's and Ms. Simes' alleged lost equity in the Burnell Property in the amount of $13.5 million. This claim was ~~is~~ also dealt with in the Toews Endorsement;

k) CI 23-01-46760 – Russell Edward Knight and Susannah Carol Simes v. Jonathan Goldenberg – relates the alleged perjury committed by Jonathan Goldenberg in an affidavit concerning an agreement for a loan of $9.425 million; and

l) CI 24-01-46855 - Russell Edward Knight and Susannah Carol Simes v. John B. Martens– relates the alleged concealment of a document by Mr. Martens with respect to the mortgage against the Burnell Street property.

[50] In this case, LSM was ambushed with the existence of voluminous relevant and undisclosed documents, during the course of the trial and non-compliance with the Dewar Order which Mr. Knight did not disclose to me or counsel for LSM. No explanation or justification for either omission was offered other than to downplay their significance. It is undeniable that this conduct constitutes a fundamental breach of LSM's right to disclosure, which impedes its right to a fair trial.

[51] Similarly, the failure of Mr. Knight to draw my attention or that of counsel for LSM to the existence of the Dewar Order or the numerous related civil proceedings as required

by the June 23, 2023 Practice Direction is not only a breach of an obligation imposed on a litigant which impacts the right of LSM to fair trial, it also violates the principle of proportionality. A plethora of lawsuits with respect to substantially the same set of facts undermines the principle of proportionality which seeks to protect the integrity of our legal system and the expectation of the public that the administration of justice will proceed effectively and efficiently for all litigants.

[52] The conduct of Mr. Knight in failing to disclose relevant documents to LSM, failing to notify the court of the Dewar Order and failing to disclose to LSM and the court the related proceedings, meets the definition of "reprehensible" conduct as described in the case law and satisfies the test for solicitor-client costs.

[53] Mr. Knight has demonstrated a win-at-all-costs mentality in this case, which somehow justified his decision to ignore his legal obligations with respect to disclosure of documents, suppress the existence of a binding court order and flood the court Registry which a plethora of statements of claims that covered substantiality of the same subject matter.

[54] I am satisfied that the efforts of LSM in litigating this claim thus far and bringing it to trial have been completely wasted in these circumstances and the work of their lawyers cannot be salvaged at a future trial. Those costs have been fully thrown away.

[55] For all of these reasons, I am ordering Mr. Knight and his related corporations to pay solicitor-client costs of $88,340.87 for costs thrown away. LSM detailed its calculations in arriving at this amount, which were reasonable in my view and not disputed by the plaintiffs.

SECURITY FOR COSTS

[56] The test for an order of security for costs are set out in Rule 56.01, which provides:

WHERE AVAILABLE	APPLICABILITÉ
[56.01] The court, on motion in a proceeding may make such order for security for costs as in the particular circumstances of the case is just, including where the plaintiff or applicant,	**[56.01]** Le tribunal, dans le cadre d'une motion présentée dans une instance, peut rendre une ordonnance de cautionnement pour frais qui est juste dans le cadre des circonstances particulières de la cause, y compris dans l'un quelconque des cas suivants :
(a) is ordinarily resident outside Manitoba;	a) le demandeur ou le requérant réside ordinairement en dehors du Manitoba;
(b) has another proceeding for the same relief pending;	b) le demandeur ou le requérant a intenté une autre instance en vue d'obtenir la même mesure de redressement et cette instance est en cours;
(c) has failed to pay costs as ordered in the same or another proceeding;	c) le demandeur ou le requérant n'a pas acquitté les dépens conformément à ce qu'ordonnait la même instance ou une autre instance;
(d) is a corporation or a nominal plaintiff, and there is good reason to believe that insufficient assets will be available in Manitoba to pay costs, if ordered to do so; or	d) le demandeur ou le requérant est une corporation ou un demandeur à titre nominal et il y a lieu de croire qu'il n'y a pas suffisamment de biens au Manitoba pour que les dépens soient payés s'il est condamné aux dépens;
(e) a statute requires security for costs.	e) une loi exige qu'un cautionnement pour frais soit versé.

[57] The test in Rule 56.01 consists of two steps as stated by Harris J. in ***Toromont CAT v. Erickson Construction (1975) Ltd. et al.***, 2021 MBQB 75 , at para. 29:

> [29] The two-stage test for the application of Queen's Bench Rule 56.01 is set out in **Lindsay v. Hy-Line Credit Union Limited et al.**, 2003 MBQB 259 as follows (at paras. 7 and 8):
>
> > … During the first stage, the onus is upon the person applying for the order to establish the basis upon which the order should be granted.
> >
> > …. the onus then shifts to the plaintiff to argue against the granting of an order on proper grounds such as impecuniosity.

[58] I have no hesitation in finding that Mr. Knight and the corporate plaintiffs should provide security for costs given the blatant abuse of the court process they commenced by way of the blizzard of statements of claim they unleashed on multiple defendants over substantially the same issues. The vexatious litigant designation of Mr. Knight in the Toews Endorsement and his trail of unpaid costs in many other judgments of this court leaves no doubt in my mind that subsections (b) and (c) of Rule 56.01 justify an order of security for costs against him and his related corporate entities. The only question remains as to whether 1004 should be required to post security for costs.

[59] The only asset 1004 owns is the interest it holds in the Ness Property, which includes a former public school that the school division no longer had any use for. The Ness Property has no tenant, but its value apparently lies in the school yard and green space which could be sold to a residential developer.

[60] Although 1004 has a registered office address in Manitoba, all of its directors and officers have Ontario addresses. All of 1004's shares are held by an Ontario corporation that had its extra-provincial registration cancelled by the Manitoba Companies Office on April 15, 2022. An Ontario corporation is the shareholder of 1004. The director of 1004, Mr. Timlock, stated under cross-examination on an affidavit that the Ontario corporation

that held the shares in 1004 had other investments and he would not provide any particulars as to same or advise if this corporation held assets in Manitoba.

[61] The main thrust of LSM as to security for costs is that the fair market value of the Ness Property as set by the City of Winnipeg tax assessment office is about $2.4 million, which is less than the $4 million in debt registered against the title. The value of the Ness Property according to 1004 and Mr. Knight is that the fair market value of the Ness Property is closer to $9 million based on the contradicted evidence placed on the record by Mr. Timlock during his cross-examination.

[62] The potential equity in the Ness Property becomes muddled due to what seems to be a financial interest that one of Mr. Knight's corporations holds in it along with 1004. It is not clear how much equity 1004 might have in the Ness Property even if its fair market value is $9 million as alleged.

[63] But a far more troubling issue arises from the fact that both 1004 and Mr. Knight also rely on yet more previously undisclosed evidence to buttress their arguments that there is sufficient equity in 1004 to satisfy an award for costs. Mr. Knight and 1004 relied on an appraisal as to the value of the Ness Property from 2019 that was only disclosed to LSM when Mr. Knight filed his affidavit of May 8, 2024 in opposition to LSM's motion for costs. The 2019 appraisal was also attached to Mr. Timlock's affidavit of May 13, 2024.

[64] During the cross-examination of Mr. Knight on his affidavit, he referred to further documents including environmental assessments, and a "trust agreement" between 575 and 1004 which provided 471 with a 49 per cent stake in the Ness Property that was never disclosed. Following Mr. Knight's cross-examination, his answers to undertakings

made reference to other undisclosed documents, including a conveyance of beneficial interest purporting to convey 575's interest in the Ness Property to 1004.

[65] The fair market value of the Ness Property and the potential equity the plaintiffs might hold in it are obviously relevant in this litigation. In fact, that issue is front and center in these proceedings. But yet again, it is clear that the plaintiffs decided to blatantly ignore their obligation under the Rules to disclose relevant documents. I have a great deal of sympathy for the argument advanced by LSM that the plaintiffs have turned the discovery process in this case into a game of hide-and-seek, which requires LSM to excavate relevant documents from the plaintiffs layer by layer and to be caught by surprise when relevant evidence is unearthed. Again, this is conduct that runs contrary to the rule against trial by ambush and the disclosure obligations of litigants in civil cases which have been enshrined in the Rules since their inception.

[66] The factors described in Rule 56.01(a) to (e) are not exhaustive and merely describe the kinds of scenarios that may lead to an order for security for costs. Rule 56.01 itself provides that the court has broad discretion to "*make such order for security for costs as in the particular circumstances of the case is just*" before enumerating the potential circumstances recorded in (a) to (e).

[67] The willingness of the plaintiffs to blatantly ignore the Rules in pursuit of a win-at-all-costs strategy makes it just to make an award for security for costs against all the plaintiffs, including 1004. The question then becomes what the amount should be.

[68] LSM argues that the Tariff costs to conclude a fresh trial would be $84,000. The plaintiffs do not really question that amount, but I think it is excessive in the circumstances. In the circumstances I will order that 1004 post security for costs in the

sum of $21,000, which is 25 per cent of the amount sought by LSM. Mr. Knight and his corporate entities will post the same amount as security.

[69] If the equity in the Ness Property is $9 million as the plaintiffs claim, the posting of security for costs should not impose an undue burden on them.

COSTS OF THIS MOTION

[70] LSM seeks solicitor-client costs for this motion. I understand the frustration of LSM that leads it to make that kind of request, but it would be excessive in light of the orders I have already made as to costs to grant solicitor-client costs on this motion. LSM will have elevated costs on this motion at double the stipulated amount under Class 4 of the Tarriff. Again, this amount must be paid forthwith.

TIME TO PAY

[71] Should the plaintiffs fail to comply with the terms of the orders as to the payment of costs and posting security for costs, as set out in this decision within 30 days of the signing of the order, LSM will be entitled to bring a motion to strike the claims of the plaintiffs.

CONCLUSION

[72] For all of these reasons I make the following orders:

a) LSM shall receive its costs forthwith as to the unsuccessful motion brought by 575, 471, Mr. Knight and Hudson Bay Traders, as per the terms of my order on October 5, 2023 in the amount of $8,841.93;

b) LSM shall receive throwaway costs forthwith on a solicitor-client basis inclusive of disbursements, in the amount of $88,340.87 from Mr. Knight, 575, 471, and

Hudson Bay Traders, resulting from the adjournment of the trial on January 10, 2024;

c) Mr. Knight and 1004 will each pay $21,000 forthwith into court for security for costs;

d) Mr. Knight and 1004 will forthwith pay the costs of this motion at double the rate of a contested motion under the Tariff; and

e) Failing compliance with the above orders set out at (a) through (d) above within 30 days from the date of the signing of the order, LSM will be entitled to bring a motion to strike the plaintiffs' claims.

[73] Fresh trial dates will not be set until the plaintiffs have complied with my orders as to costs herein.

_____

Rempel J.