Court of King's Bench of Alberta

Citation: Remington Development Corporation v Canadian Pacific Railway Company, 2023 ABKB 591

Date: 20231020
Docket: 0801 03152
Registry: Calgary

Between:

Remington Development Corporation

Plaintiff

- and -

Canadian Pacific Railway Company and His Majesty the King In Right of Alberta, as Represented by the Minister of Infrastructure and the Minister of Transportation

Defendants

Memorandum of Decision on Costs
of the
Honourable Justice A. Woolley

Introduction

[1] In judgments dated October 20, 2022 and August 30, 2023, the Court awarded $165,166,431 with pre-judgment interest payable from December 4, 2006 to the Plaintiff Remington Development Corporation against the Defendants Canadian Pacific Railway and His Majesty the King in Right of Alberta: ***Remington Development Corporation v Canadian Pacific***

Railway, 2022 ABKB 692 and ***Remington Development Corporation v Canadian Pacific Railway***, 2023 ABKB 493 at para 122.

[2] The parties were unable to agree on the costs payable to Remington. Remington filed a costs brief on April 3, 2023, with a supporting affidavit from Mr. Remington. The Defendants filed briefs on June 2, 2023, and also applied for production of Remington's legal and expert invoices, which the Court ordered Remington to provide on July 6, 2023. After an oral hearing on August 4, 2023, the Defendants filed supplementary briefs on September 15, 2023, Remington filed a supplementary brief on October 6, 2023, and the Defendants filed reply supplementary briefs on October 13, 2023.

[3] After adjusting its claim to acknowledge the legitimacy of points made by the Defendants, Remington now seeks costs in the amount of $4,801,339.41. These costs include legal fees in the amount of $2,598,413.16 which are Remington's actual legal fees, less GST and the costs associated with judicial dispute resolution, multiplied by 50%. They also include disbursements, less disbursements associated with the JDR and a reduction in photocopying costs, in the amount of $117,017.22. Finally, they include the costs of Remington's experts, less GST and the removal of travel costs incurred by Remington's Toronto based expert, Duff and Phelps, in the amount of $2,085,909.03.

[4] For the reasons that follow I find that Remington is entitled to a costs award of $4,003,605.76.

Issues

[5] The issues to be resolved are:

1. Is this a proper case for costs to be awarded as a percentage of Remington's incurred legal fees?
2. Can this Court assess the reasonableness of Remington's legal fees and expert fees, or ought they to be referred for assessment?
3. Were Remington's legal fees and disbursements reasonable and proper?
4. What percentage ought to be applied to Remington's legal fees to calculate the costs required to be paid by the Defendants?
5. Were Remington's expert fees and disbursements reasonable and proper?

Analysis

The Law of Costs

[6] In general, a successful party is entitled to costs: *Alberta Rules of Court*, Alta Reg 124/2010, Rule 10.29.

[7] The Court may order a party to pay the reasonable and proper costs incurred to carry on an action: Rule 10.29(1)(a); Rule 10.31(1) and (2)(a); ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 17; ***B(R) v Children's Aid Society of Metropolitan Toronto*** [1995] 1 SCR 315 at 404-405.

[8] Rule 10.33(1) directs the Court to take into account "all or any of the following":

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the importance of the issues;

(d) the complexity of the action;

(e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers.

[9] What constitutes reasonable and proper legal fees may also be assessed in light of the factors set out in Rule 10.2 and in particular:

(a) the nature, importance and urgency of the matter,

(b) the client's circumstances…

(d) the manner in which the services are performed,

(e) the skill, work and responsibility involved, and

(f) any other factor that is appropriate to consider in the circumstances.

Barkwell v McDonald, 2023 ABCA 87 at para 59

[10] A Court may impose costs based on Schedule C, and the Court of Appeal has noted that doing so has "the advantage of providing parties with greater certainty as to their exposure to costs, it is simple, efficient, and inexpensive to apply, and in many cases avoids the need for lengthy inquiries into and assessment of the appropriate level of costs": ***Barkwell*** at para 53.

[11] The Court of Appeal has also suggested, however, that Schedule C provides a "rough measure" of the costs incurred in "the ***ordinary*** case" [emphasis added]: ***Barkwell*** at para 57. In appropriate circumstances the Court has discretion to award a percentage of the solicitor-client costs incurred by the client: ***McAllister*** at para 29.

[12] If the trial judge does so, however, they must engage in a "detailed analysis" to determine whether the costs billed to the client were "reasonable and proper costs". Simply because a client received a legal invoice and paid it, does not demonstrate that the costs were reasonable and proper: ***Barkwell*** at para 59; ***McAllister*** at para 46.

[13] The fundamental issue is proportionality, balancing proper indemnification to the successful party with avoiding improper barriers to the court or penalizing the unsuccessful party: ***Barkwell*** at para 57.

[14] Where a plaintiff has advanced a meritorious claim, and the defendant has defended vigorously, then "indemnification should be the principal consideration": ***McAllister*** at para 36.

[15] Generally speaking, recoverable costs should reflect 40 to 50% of the costs that "***should reasonably have been incurred*** given the issues" [emphasis in original]: ***Barkwell*** at para 58; ***McAllister*** at para 41-43. Further, they should reflect not just what was reasonable for the successful party to have paid to advance the action, but also what the losing party "should reasonably be expected to pay": ***Barkwell*** at para 59; ***McAllister*** at paras 46-48.

[16] In addition to the factors set out in Rules 10.2 and 10.33, the Court should also consider:

> the hourly rates being charged (including paralegal or administrative time), whether those rates were appropriate given the seniority and experience of counsel, whether the work was being done by lawyers of appropriate seniority, the number of counsel involved, whether the duration and intensity of pre-trial questioning was appropriate or excessive or disproportionate, whether unnecessary interlocutory proceedings were launched and the outcome of those proceedings, and whether the ultimate fee was proportionate to the issues: ***McAllister*** at para 47; ***Barkwell*** at para 60.

[17] Expert fees are not automatically recoverable; they are only recoverable if ordered by the Court: Rule 10.31(2). The question for the Court in determining whether to permit recovery of expert fees is whether they "were reasonable and proper at the time they were incurred": ***Dirk v Toews***, 2020 ABCA 477 at para 43; ***ENMAX Energy Corporation v Alberta***, 2018 ABCA 291 at para 7. The Court may consider whether an expert's opinion was helpful: ***Copithorne v Transalta Utilities Corp***, 2007 ABQB 82 at para 7. It may also consider whether experts gave overlapping evidence, and whether the expert constrained their work to what was necessary and reasonable in the circumstances: ***Meehan v Holt***, 2011 ABQB 110 at paras 33 and 37. The Court may compare the relative cost of an expert's evidence – whether the party has chosen "a Cadillac when a Buick will do": ***Carroll v ATCO Electric***, 2017 ABQB 641 at para 20.

Indemnity Costs

[18] I am satisfied that it would not be proper to calculate Remington's costs entitlement based on Schedule C. The length and complexity of the trial, the $165,166,431 in damages awarded to Remington, and the intensive legal resources employed by all parties, render this trial too far from the "ordinary case" for Schedule C to provide appropriate guidance as to what would be a fair and proportionate costs award.

Assessment of Reasonable and Proper Costs

[19] I am also satisfied that I ought to assess whether Remington's legal and expert fees were reasonable and proper, rather than referring those fees to assessment. It would not be wrong to refer the matter to assessment. However, the parties have already provided extensive evidence and materials, and participated in an oral hearing. Further, I have existing knowledge of the conduct of the trial and its relationship to the substantive decision. These factors make it fair and efficient for me to assess Remington's cost claim.

[20] In particular, the factors set out in Rules 10.33 and 10.2 can be analyzed by me based on my existing knowledge as the trial judge; it would be considerably more complicated and difficult for an assessment officer to conduct that analysis, particularly in relation to assessing the complexity of the action, the manner in which the services were performed, the skill, work and responsibility involved and especially the overriding question: "whether the ultimate fee was proportionate to the issues": ***Barkwell*** at paras 60, 57.

Were Remington's Legal Fees and Disbursements Reasonable and Proper?

[21] Assessing Remington's legal and expert fees requires considering those fees in relation to the factors set out in Rules 10.33 and 10.2 and, as well, reviewing the evidence showing how the fees were incurred and calculated: ***McAllister*** at para 46. The fees must be reasonable and proper in relation to the action and judgment, as the Rules provide, but must also be reasonable and proper in and of themselves.

[22] The legal fees submitted by Remington, less GST and fees related to the 2012 and 2021 judicial dispute resolution processes, are $5,196,826.32. While these fees are substantial, they are approximately 3% of the total damages award achieved by Remington (5.2/165=.0315).

[23] The fees submitted for recovery do not include all of the fees paid by Remington. In addition to excluding the fees associated with the JDR – even though work done for judicial dispute resolution would have been relevant and useful for the trial – Remington has excluded all legal fees prior to 2009, when the Province was added to the action. This creates an inherent conservatism to Remington's fees since there is no reason, as a matter of principle, that its fees ought not to include steps taken in the initial identification and commencement of the action, even if at that time CPR was the only Defendant.

[24] Remington succeeded at trial. It did not recover all of the damages it sought, and it did not prevail on every factual and legal argument it made. But both CPR and the Province denied any liability and denied that Remington had suffered any loss. They vigorously resisted its claim. Further, the reductions made to Remington's damages claim by the Court were not – as CPR submitted in its original costs brief – because the Court rejected Remington's damages model. The Court accepted Remington's damages model: ***Remington***, 2022 at, for example, paras 895, 1019, 1101-1102 and 1149-1150. It accepted the relevance and reliability of all of Remington's expert evidence and witnesses. The judgment made some specific adjustments to the calculations within that model, and added an adjustment for mitigation, which resulted in a lower award than the one originally sought. But, conceptually, Remington achieved what it sought: a finding of liability against both Defendants, and a damages award based on the profits it was unable to achieve because of the Defendants' conduct.

[25] The case was important to Remington. While Remington has a broad range of business and development activities, the Railtown project was especially significant both in its scope and in its importance as a potentially City shaping development. Further, this case mattered to Remington as a matter of principle. As Mr. Remington said when CPR told him that it was selling the land to the Province – "we had a deal": ***Remington***, 2022 at para 404. Remington's willingness to pursue this case over many years and in the face of the Defendants' refusal to admit any liability can be understood as a reflection of Mr. Remington's position that a deal made should be a deal honoured.

[26] The trial was complex. The parties had very different understandings of the 10th Ave Agreement. All parties introduced a range of arguments and positions that had to be considered beyond the central questions of liability and damages (for example, the Defendants' arguments on estoppel and waiver). The damages calculation was complicated, requiring numerous expert reports from both CPR and Remington, all of which were addressed through testimony and considered by the Court.

[27] All parties took steps to shorten the trial proceedings where they could. CPR and the Province's trial counsel worked with Remington's trial counsel to have a sensible and agreed upon approach to exhibits. No counsel engaged in excessive or trivial cross-examination. Counsel did not bring unnecessary or frivolous objections to the examinations conducted by other counsel. As hard fought as the trial was in relation to the substantive issues, it was nonetheless notable for the civility, efficiency and fairness of trial counsel.

[28] Based on what I observed in the conduct of the trial, the skill, diligence and effort of Remington's legal counsel were exceptional. The written submissions Remington provided were

thoroughly researched, clearly argued and helpful to the Court. Their oral argument was similar. Remington's counsel examined opposing witnesses efficiently and respectfully, and presented the evidence of its own witnesses efficiently and properly. Counsel identified and presented relevant, qualified, independent and reliable experts whose evidence could be used to identify the loss Remington suffered as a result of the conduct of the Defendants. As noted, counsel for Remington worked well with the trial counsel for CPR and the Province, reaching agreement on procedural matters so as to allow the trial to proceed as efficiently as it could.

[29] Based on these considerations I am satisfied that, as a general matter, Remington's legal fees were reasonable and proper.

[30] Reviewing the invoices and charts provided by Remington does not change that assessment. The invoices show the lawyers gradually – albeit slowly – advancing the matter towards trial. The invoices show Remington's counsel doing the necessary pre-trial work of discoveries, undertaking responses, production of documents, motions and responses, research into important issues, efforts to settle, consultation with the client, and preparation of materials and witnesses for trial.

[31] The invoices and charts show the trial team enjoying the leadership and guidance of Mr. Vogeli throughout. They show as well that while a number of junior associates and students did particular work on matters, the core senior team remained consistent, albeit with a significant adjustment when Ms. Varzari left the team.

[32] The Defendants suggested that Remington used too many lawyers, and that it did so in part because of the length of time it took to get to trial. They also suggested that lawyers likely billed for reviewing materials to get up to speed, which they would not have had to do had the matter progressed more quickly. They suggested that the length of time taken to get to trial supports an inference that the fees incurred over that time were unreasonable – as CPR put it, "delay necessarily breeds inefficiency".

[33] I do not accept this submission. As noted, my review of the invoices shows the consistent involvement of Mr. Vogeli and a relatively low turnover of more senior associates and partners – Mr. Donaldson appears on invoices as early as 2009 (referenced by Ms. Varzari in an entry dated May 7, 2009) – which is not consistent with the submission that the passage of time resulted in the churning of lawyers and work. Further, it is evident from the invoices that junior lawyers and students were completing specific and discreet tasks that did not require ongoing or particular familiarity with the file. I note for example the research with respect to the *Railway Act* completed by Ms. Joyce in July-September 2010, which was done under the guidance of both Ms. Varzari and Mr. Vogeli. Similar examples are the research on estoppel and waiver in 2012, on punitive damages in 2013, 2014 and 2015, and on specific performance in 2013, 2014 and 2016. Other tasks, such as filing materials at the courthouse (done by a student in 2011, for example) also do not suggest churning or overpopulating a file, but rather distributing discrete work tasks to lower cost lawyers competent to complete them.

[34] Remington did have six lawyers in trial for much of the time, a number which would ordinarily be inconsistent with reasonable and proper fees. It also had a large number of lawyers engaged in trial preparation. CPR also, though, had six lawyers present for much of the trial, and the Province almost always had two, even though the Province participated only minimally in the presentation of evidence or in response to Remington's evidence. In this context, the number of

lawyers used by Remington for trial preparation and attendance was not unreasonable or improper.

[35] Remington's invoices did not substantiate the Defendants' claim that lawyers spent material amounts of time on file review to catch up for time gaps in the progress of the trial. There were examples of lawyers reviewing transcripts to prepare interrogatories, for example, or to prepare submissions, but I did not identify time billed for basic file review.

[36] A search of the legal invoices found three examples of the phrase "file review" but one was with respect to review of the City's file (June 30, 2009), one was with respect to the "original CP file produced in litigation" (December 6, 2012) and one was Ms. Varzari considering obtaining assistance with "file review" (December 9, 2011). The term "review file" occurs 52 times, but in those examples the work still seemed generally to be to advance the claim or to be relatively minimal – see, for example, entries on September 22-26, 2016; reviewing file for research on January 25, 2010 and October 30, 2011; and, half an hour for "Review file" on July 24, 2020. The word "review" appears about 2200 times, but considering a selection of those entries does not support the allegation of duplicative or unnecessary work, but again suggests work done to progress the file – for example, "reviewing correspondence from both opposing counsel" (April 17, 2009); "Review Altus draft report" (January 19, 2016).

[37] The invoices do show lawyers researching similar general topics in different time frames (for example, specific performance and punitive damages) but given the complexity of the legal issues in this file, I am not prepared to infer that the research performed was duplicative or unnecessary.

[38] The invoices also suggest that some of the delay was for things outside Remington's control, such as obtaining documents through freedom of information processes. Invoices in May 2012 indicate that the lawyers had to "review and consider City's Shepard Lands FOIP response" (May 30, 2012). In July 2015, lawyers had a "Call with Legislative Assembly FOIP officer re: FOIP request" (July 20, 2015). The ongoing FOIP and disclosure of information associated with expert reports largely explains, as Remington noted, the multiple affidavits of records it produced, and counters the suggestion that the extended approach to production resulted in inflated fees.

[39] In addition, the invoices show that during that period Remington and the Defendants explored settlement and alternative dispute resolution processes, notably in 2012, 2017 (e.g., November 24, 2017) and 2021, which could have contributed to the delay, but not in a way that generates improper fees, particularly given that the fees associated with mediation in 2012 and 2021 have been removed.

[40] As Remington points out, it incurred 53% of its legal fees in 2022, when it was preparing for and attending trial, and it incurred another 17.5% in 2019-2021, when the lawyers were working with experts. The prior ten-year period accounts for only 30% of its fees. It is not obvious that had the ten-year period been shorter the fees incurred would have been materially lower. The Defendants ask me to infer that they would have been, but I am not satisfied that the evidence supports that inference.

[41] Ultimately, I do not know why there is such a long period of time from the filing of the initial Statement of Claim to the trial. But I am not satisfied that the length of time improperly inflated Remington's legal fees, or that it makes them other than reasonable and proper given the

factors set out in the Rules, and given the evidence contained in Remington's invoices and charts. The Defendants suggest, in essence, that the delay itself justifies an inference that the fees incurred were unreasonable and proper. Based on the evidence as a whole I am not satisfied that such an inference is warranted.

[42] In general, I was impressed by the extent to which Remington's invoices contain specific information and details about the work that was done. I note as just a few examples of the hundreds of such entries:

> Detailed call with Master's chambers clerk re: motion to amend pleadings; draft correspondence to Master's clerk confirming motion and filing dates; draft correspondence to opposing counsel re settling dates for cross-examination on affidavits (January 12, 2009)
>
> Prepare for and attend team meeting with G. Vogeli and D. De Groot to discuss file status in further detail and to assign additional tasks to move matter to trial including any remaining interviews/questioning, outstanding motions, document review, litigation plan, issue agreement, expert reports, and client requests (i.e. review of 6th Street land transfer by notification issue); review and consider documents, questioning, undertaking responses, and correspondence to understand and report to G. Vogeli and client the facts and law surrounding the 6th Street land transfer by notification; report findings of notification investigation to G. Vogeli in advance of upcoming client meeting (August 11, 2014)
>
> Review and revise action list; correspondence with G. Vogeli re: consolidated research index and folder; review punitive damages research memorandum and correspondence with G. Vogeli re: pleading amendment; correspondence with opposing counsel re: provisions of privilege log records; review of research on notification land transfers and correspondence with G. Vogeli re: same (May 2, 2017)

[43] The Defendants raised concerns with examples of block billing – where lawyers invoiced blocks of time with limited descriptions, for example, "preparation for and attendance at trial". In my observation, however, those entries were not standard, and when they did occur were more typical of (although not limited to) Mr. Vogeli. On April 2, 2022, for example, Mr. Vogeli entered "Prepare for trial" and Ms. Stoicheff entered "Assist with matters in relation to trial preparation" but Mr. Donaldson, Ms. Hayes, Ms. Peters, Ms. Whitehead, Ms. Gregg and Ms. O'Brien provided detailed entries explaining the work completed:

> MJD: Complete outline of S. Davidson examination-in-chief; meet with Grant Vogeli regarding trial preparation; meet with Rosemary Gregg;
>
> SKH: Detailed review of Province brief; correspondence with Grant Vogeli and Mike Donaldson regarding Province brief; review of research and correspondence regarding John Walsh regarding virtual attendance;
>
> LP: Review cases for best examples of court admitting evidence of prior negotiations, drafts of agreements as part of the factual matrix; review pre-trial brief of CPR

> CTW: Locate and consider how courts have interpreted silence in different types of estoppel as a possible method by which a representation of an assurance can be given;
>
> RMG1 Email maps to Alix Stoicheff, Shannon Hayes and Grant Vogeli and raise issue; review transcript to see if S. Menzies or G. Lawrence were questioned about maps; e-mail to P. Norman with fileshare link; meetings with Grant Vogeli; finalize opening statement and prepare documents; review questioning transcripts for various facts; discuss with Grant Vogeli; review draft chief of S. Davidson
>
> KSO: Research into cases provided by counsel for CPR in letter requesting virtual testimony of witness; research into importance of presence of witness in assessing credibility; review of proof charts; review of evidence chart; drafting templates for summaries of trial.

[44] Further, it is not clear what additional information would be useful to the Defendants or the Court in substantiating that the time billed was reasonable and proper. Had Mr. Vogeli on April 6 added "for examination of Mr. Remington" to his entry "prepare for and attend trial" it would have added nothing to what is evident from the trial record. Even detailing how Mr. Vogeli prepared for trial would have added little to nothing to the Court's assessment of the fees. That Mr. Vogeli was at the trial and was well prepared when he got there would have been evident to counsel for the Defendants. It was certainly evident to me.

[45] The Defendants suggested that the redactions in Remington's invoices may hide unreasonable or improper fees – that the redactions rendered Remington's legal fees indeterminate and unclear. I also reject that argument. Considered over the hundreds of pages of invoices the redactions are minimal; Remington could have claimed privilege over a wide range of invoice entries (for example, with respect to the subject matter of legal research) and chose not to do so. The redactions that have been made do not undermine the ability of this Court to assess the reasonableness of Remington's fees. Moreover, to use careful and limited redactions as a basis for a global reduction in the fees would amount to an unreasonable interference with solicitor-client privilege – it would mean a client could enjoy the privilege, but only at the expense of foregoing the costs indemnity to which the client would otherwise be entitled.

[46] I also assess Remington lawyers' hourly rates to be reasonable and proper. They were high hourly rates, but lower than those charged by some Calgary lawyers – including those representing CPR, based on the one invoice that was provided in these proceedings. That invoice suggests that Remington's lawyers charged as much as $150 per hour less than did CPR's, even for lawyers of greater experience.

[47] CPR could have provided information about the fees it incurred in this litigation to support its position that Remington's fees were excessive. CPR had no obligation to do so but that it did not, when combined with the Defendants' failure to identify specific examples of work performed by Remington's counsel that was unreasonable or improper (except as discussed below), supports the overall impression provided from reviewing Remington's invoices, which is that the fees incurred to advance this matter were reasonable and proper.

[48] CPR submits that Remington's adjustments to its cost claim in response to the Defendants' argument suggests that it "significantly overreached" in its original submissions, that it "tacitly concedes that its initial approach to costs was improper" and that as a result

"further scrutiny of Remington's claimed legal and expert fees is both necessary and warranted". Having undertaken scrutiny of Remington's legal fees (which I was required to do in any event) I am satisfied that they are reasonable and proper for the reasons I have provided. I would also note, however, that I do not accept CPR's characterization of Remington's approach to costs or its significance.

[49] First, while I ordered Remington to provide its invoices, and found them useful to my consideration, those invoices substantiated the charts Remington had already provided; the charts detailed the legal work done. The charts provided information on each lawyer, their hours worked and hourly rate. It was possible from the charts to see what the invoices confirmed, which is that Remington's legal fees were reasonable and proper.

[50] Second, Remington has not at any point taken an extreme position on its legal fees. It provided the detailed charts to be of assistance to the Court and the Defendants. It eliminated legal fees prior to 2009 without that issue needing to be argued. It acknowledged that fees related to the JDRs had to be removed, even if it did not remove them perfectly. While it claimed GST and later removed it, it is as likely that Remington's counsel belatedly recognized the point that Remington could recover the GST it had paid through an input tax credit than that they conceded the dubious argument made by the Province that its own GST-exempt status is somehow relevant to the entitlement of a counter-party to recover GST paid for legal services in a costs award.

[51] Third, I take exception to CPR's suggestion that where a party acknowledges points made by the other side, or adopts a less aggressive position than it has done previously, that this ought to be viewed as evidence of malfeasance warranting additional scrutiny. Indeed, I would argue that a party's willingness to accept a reasonable argument made by the opposing party or the Court could just as easily – and perhaps more fairly – be seen as evidence of that party's general reasonableness.

[52] The Defendants did identify some further specific concerns and issues.

[53] CPR submits that Remington ought not to be permitted to include costs associated with the production of documents during trial with respect to work Remington had done in 2020-2021 and the potential development of the InterLink lands.

[54] I do not accept CPR's position. CPR asked for production of the documents after Mr. Remington mentioned the potential development of Remington's remaining lands in his testimony, and in the circumstances I thought it appropriate to grant its request. But the documents were substantially irrelevant to the issues in the case (see ***Remington***, 2022 at para 1173, for example) and I do not view Remington as having acted improperly in not disclosing them earlier. In addition, as Remington observes in its response, the request for the documents and the satisfaction of that request "merely reflects the normal back-and-forth of a hard-fought and lengthy trial". Remington is entitled to include the costs associated with satisfying CPR's request in its trial fees.

[55] The Province submits that Remington ought to have excluded costs associated with pre-trial motions against the Province where the motions resulted in costs awards being made in favour of the Province. Remington brought a motion to add the Province as a defendant; the motion was granted, but costs were awarded to the Province. Remington further brought a motion to compel production of documents from the Province. The motion was partially successful and the Province was awarded partial costs; Remington was not awarded costs. The

Province submits that it should not be responsible "for indemnification at any percentage for legal fees on a matter where costs were granted to the Defendants". It further submits that, if those costs orders have not previously been paid, they ought to be set off against the Province's cost claim.

[56] Remington submits that its success against the Province at trial, and the Court's reliance on the documents obtained through the production motion in its judgment, mean that it ought to be able to include the motion costs in its trial costs.

[57] The costs associated with these two motions must be removed from Remington's litigation fees. While I agree with Remington that it seems unfair to deny it recovery of these costs given its success at trial, to do otherwise would undermine the costs orders originally made. Costs could have been ordered in the cause. They were not. They were ordered to be paid by Remington to the Province, and Remington was not awarded costs against the Province. That decision cannot be effectively reversed by now allowing Remington to include its costs in its trial costs claim. The Province calculated the costs of the motions at $49,641.77, and Remington did not dispute its calculation; that amount must thus be deducted from Remington's legal fees.

[58] I make no order with respect to set off as I do not have a sufficient basis for doing so; the original court orders determine the legal rights and responsibilities of the parties with respect to the costs of the motions.

[59] The Province also seeks not to have costs awarded against it in relation to motions involving only CPR and Remington. That issue is, however, properly addressed as part of the apportionment process, not here. The only issue here is the costs to which Remington is generally entitled given its success at trial; which portion of that is properly allocated to CPR, and which to the Province, is not before me at this point.

[60] Neither the Province nor CPR raised an issue with respect to the adjusted disbursements of Remington's legal counsel (adjusted to remove GST and to lower the photocopy costs). Having reviewed the invoices, I am satisfied that, with one exception, the disbursements as adjusted, in the amount of $117,017.22, are reasonable. The exception relates to invoices including charges for Mr. Vogeli to travel to Toronto in May 2018 ($612.54), in June 2019 ($1749.55+$2022.35) and for Mr. Donaldson to travel there in April 2022 ($144.66), for a total of $4529.10. Removing these amounts is consistent with Remington's decision, which in my view was appropriate, to remove travel to Toronto from disbursements. This results in Remington's allowable legal disbursements being $112,488.12.

[61] As a final point with respect to legal fees, the parties disagreed on whether it was appropriate to apply a percentage discount for fees to ensure they are reasonable and proper prior to applying the ***McAllister*** percentage indemnity. While I have determined that there is no evidentiary basis for applying such a discount to Remington's legal fees, I agree with the Defendants that doing so can be appropriate in certain circumstances. Obviously, it is preferable to exclude specific fees or categories of fees where including those fees is not reasonable and proper (in this case, for example, where the pre-trial motion fees related to the Province were identified and removed). However, there may be circumstances where a global discount is necessary to ensure that the fees to which the ***McAllister*** indemnity is applied were in fact reasonable and proper – for example, where the lawyer's hourly rates were generally excessive, or where the fees are not reasonable and proper when considered in light of the criteria in Rules 10.2 or 10.33. To put it differently, the ***McAllister*** indemnity applies only to fees that are

reasonable and proper; if a discount is necessary to ensure that fees are reasonable and proper, then the discount ought to be applied prior to the indemnity being applied.

[62] Based on the foregoing, Remington's reasonable and proper legal fees are $5,147,184.55, with $112,488.12 in disbursements.

What percentage ought to be applied to Remington's legal fees to calculate the fees required to be paid by the Defendants?

[63] The factors in Rules 10.2 and 10.33, discussed earlier, support Remington receiving 50% of its legal fees in a costs award. The size of the judgment relative to the fees incurred, the complexity of the issues, Remington's success in its claim and the importance of the case to Remington all support an award at the higher end. Fifty percent of Remington's reasonable and proper legal fees is an appropriate and proportionate indemnification.

[64] The Schedule C fees in Remington's Bill of Costs are only $388,335; however, when considering that the judgment is over 80 times the $2,000,000 referenced in Column 5 of Schedule C, and the criteria in Rules 10.2 and 10.33, that benchmark is of limited relevance.

[65] CPR suggested that Remington ought to receive a lower percentage indemnity based on what it described as "unsubstantiated allegations of bad faith": ***Sunridge Nissan Inc v McRuer***, 2023 ABCA 128 at paras 48-49. I do not accept this position.

[66] The Court's finding that CPR did not act in bad faith relative to Remington depended significantly on its rejection of CPR's own account of its behaviour. Had the Court found that CPR – as it strenuously maintained – did not declare the 10th Ave Lands surplus in fact and in law, the Court would have had "serious concerns about whether CPR's conduct was consistent with the duty of good faith":

> [322] Had I found that CPR had not made those efforts, I would be inclined to view their conduct as dishonest and as a breach of their duty of honest performance. In particular, I would be troubled by, in this hypothetical, CPR doing nothing to decide whether the lands were surplus or not while, non-hypothetically: a) CPR continually extended the Agreement; b) CPR participated in the subdivision application, decided what land to include and surveyed the land; c) made statements at the time, through Mr. Hyder's e-mail, that the only issue was whether some tracks beyond the four main line tracks would need to be included, something that could be accommodated within that application given that only 100 feet of lands were included east of 4th Street SE; d) indicated to Remington that the surplus decision would be made soon, particularly at the time of contracting; e) marketed the B Yard Lands as a single parcel for development; and f) explicitly told Mr. Cooper of Remington that the removal of the tracks was "imminent".
>
> [323] That is, I find that CPR acted honestly towards Remington in part because I have found that they declared the 10th Ave Lands to be surplus, both in fact and in law. Had I not made that finding, I would have serious concerns about whether CPR's conduct was consistent with the duty of good faith, despite the "absolute" nature of their discretion under Article 6.08(c). That absolute discretion permitted CPR to either declare the lands surplus or not, based on its subjective assessment of the situation. It did not justify CPR making no decision at all while, through its

> words and conduct, giving Remington the impression that it had done so, and that the closing of the 10th Ave Agreement was only a matter of time: ***Remington***, 2022 at paras 322-323.

[67] It does not lie in CPR's mouth to accuse Remington of having made an unfounded allegation of bad faith when it is because the Court rejected the account CPR gave of its conduct that that allegation was unfounded.

[68] Further, while the Court did not find that CPR otherwise engaged in wrongdoing sufficient to amount to a breach of its contractual duty of good faith, it did acknowledge that Remington had a basis for expressing concerns with the honesty of CPR's behaviour:

> [316] I acknowledge that CPR constructed the transaction with the Province to bolster its argument that the lands were not surplus, such that it had no ongoing obligation to Remington. In a draft of the memorandum of understanding CPR had initially included a clause that CPR would declare the lands surplus prior to the sale:
>
> > The Vendor shall have determined in its absolute discretion that the Lands are surplus to the operational requirements of the Vendor. This condition is inserted for the sole benefit of the Vendor and may be unilaterally waived by it. This condition shall be satisfied or waived on or before March 30, 2007.
>
> [317] But then, in the signed Memorandum of Understanding, they changed the language to say, "the lands described herein are not currently surplus". I infer that this change was made because CPR realized that if it declared the lands surplus prior to the sale to the Province, it risked prejudicing its position that the 10th Ave Agreement could not close because the lands were not surplus. Further, in initial drafts of the memorandum of understanding, a clause was included that Remington would confirm that it had no interest in the lands, and that clause was removed because Mr. Walsh knew that Remington would never give that confirmation.
>
> [318] Various terms added to the transaction between CPR and the Province, although ultimately doing nothing to preserve Remington's interests, such as a right of first offer, and the agreement that the Province would work with Remington towards an integrated development, suggest that CPR approached the negotiations with the Province aware that its actions were likely to cause problems with Remington, and those problems were better avoided.
>
> [319] Also, CPR made sure that the closing date for the sale of the lands did not occur until several months after the expiry of the 10th Ave Agreement and structured the sale so that it fell within Mr. Walsh's signing authority, rather than needing a higher level of review.
>
> [320] Nonetheless, these circumstances speak to the manner of CPR's breach, but they do not change the nature or quality of the breach, which arose from CPR's decision to sell the lands to the Province when it was obligated to sell them to Remington. They arguably show some consciousness in Mr. Hyder and Mr. Walsh what they were doing was wrong, but that is not sufficient to show the

dishonesty necessary for a finding of bad faith or dishonest performance: ***Remington***, 2022 at paras 316-322.

[69] Similarly, while the Court rejected Remington's claim of punitive damages, it did so because the conduct of the Defendants did not meet the legal requirement of being a marked departure from ordinary standards of decent behaviour. Remington largely substantiated its factual claims about the Defendants' conduct: ***Sunridge*** at para 49; ***Remington***, 2022 at paras 1205-1208. Nor did the Court disagree with Remington's characterization of the Defendants' behaviour as problematic, describing the Defendants as not being "properly thoughtful about their own conduct or situation" and as "careless and self-centered"; the Court said that the Defendants did not think about Remington "one way or another, even when they should have. They acted unlawfully": ***Remington*** 2022 at paras 1207-1208.

[70] If CPR suffered a reputational injury as a result of Remington's claim, that injury can fairly be attributed to its own conduct, rather than to how Remington characterized that conduct as a matter of law, or whether this Court accepted Remington's legal characterization.

[71] Remington's recoverable legal fees are thus $2,573,592.28.

Were Remington's Expert Fees Reasonable and Proper?

[72] Remington seeks to recover the fees and disbursements associated with nine experts, as set out in Mr. Remington's costs affidavit:

Peter Norman, David Crane and Jacob Hofer: $169,177.50 (fees)

Benjamin Lee and Stephen Shawcross: $147,782.33 (fees) and $9,916.83 (disbursements)

Greg Brown: $81,746.13 (fees) and $2,523.07 (disbursements)

Paul Sharp: $134,397.50 (fees) and $9,407.83 (disbursements)

Brad Wagar: $28,850 (fees) and $696.02 (disbursements)

Scott Davidson: $1,501,503.50 (fees only)

[73] It does not seek to recover GST or the disbursements incurred by Mr. Davidson and his firm, since those disbursements largely related to travel from Toronto. Remington also indicates negative disbursements for the Altus Group (Mr. Norman et al), in the amount of $112.77.

[74] The Defendants submit that the fees of Mr. Davidson and his firm (Duff and Phelps) ought to be reduced by 60%, and that the fees of the other experts ought to be reduced by 20%.

[75] The Defendants' submissions in favour of the 20% reduction are that the expert invoices are deficient, failing to provide hourly rates, terms of compensation or, for the most part, description of the specific tasks performed. CPR suggested that, as a result, "[t]here is no way to tell whether the expert fees being claimed are reasonable and proper in light of the work performed".

[76] I do not accept the submission that the expert fees apart from Duff and Phelps' ought to be reduced by 20%. The fees can and should be assessed based on the measurable output of those experts, namely their expert reports and testimony. These experts collectively provided sixteen expert reports, and extensive oral testimony at trial. The reports were careful, detailed and assisted the Court in its analysis. The testimony of Remington's experts in direct and cross-

examination was thorough and aided by the experts' willingness to engage with questions and problems posed by the Court.

[77] Without the expert evidence, quantification of Remington's loss would have been impossible. The Defendants offered expert evidence on only some of the important points testified to by the Remington experts. The equivalent experts the Defendants engaged – Mr. Romanesky, Mr. Brunner and Mr. Delf – were less qualified than Remington's experts. I do not hesitate to find that the fees of these Remington experts are reasonable and proper in the circumstances.

[78] CPR raised a specific question as to whether IBI's invoice included time for Mr. Shawcross to prepare for his testimony as a fact witness. This concern is fair given the limited detail in the invoices; however, I am not satisfied that it is sufficient to render the IBI invoices not reasonable and proper given the two experts included, the four expert reports they provided to the Court and their testimony.

[79] I do, however, view it as appropriate to adjust the disbursements charged by this group of experts. Remington has already removed the disbursements associated with the travel claims of Duff and Phelps and its predecessor firm. The other experts also, though, claim mileage and meals which I am not satisfied ought to be recoverable. Further, a number of the experts charge flat rate or percentage "administrative" charges, "expenses" or "disbursements" which I am not satisfied have been shown to be reasonable and proper. As such, I limit the disbursements recoverable by Remington from this group of experts to the following:

> $715.64 (graphic reproduction, Brown and Associates)
> ($443.38+$231.34+$12.30+$28.62)
>
> $4217.28 (aerial photos, printing, copying, graphics and other, IBI)
> ($1350+$7.35+$17.50+2108.27+$47.55+$284.96+$17.00+$284.85+$27.00+$61.80+$11.00)

[80] With the disbursement credit from the Altus group, that makes the recoverable disbursements $4,820.15.

[81] With respect to Duff and Phelps, the Defendants point to the high number of hours (nearly 3000), the high hourly rates and what they identify as discrepancies in Duff and Phelps' invoices that, they suggest, call the propriety of those invoices into question. CPR goes so far as to suggest that Duff and Phelps had "inflated docket entries" and engaged in "systematic inflation" of its fees; the Province accuses Duff and Phelps of "inflated time keeping". The Defendants also question whether the work of an expert the Court described as the "math guy" could justifiably have resulted in fees of $1,501,503.50. Finally, they suggest that to the extent Duff and Phelps worked more hours, or had a supervisory or coordinating role in relation to the evidence of the other experts, that may be reflective of a team or strategic approach to the quantification of damages, which calls the independence of Mr. Davidson's evidence into question.

[82] I do not accept the Defendants' submissions based on the Court's characterization of Mr. Davidson as the "math guy", or their questioning of Mr. Davidson's independence. It is (and was) clear that the "math" done by Duff and Phelps included identifying the appropriate mathematical model for calculating damages, ensuring that the model had the appropriate inputs from the other expert witnesses, and calculating the damages based on the model and the inputs –

see, for example, the Duff and Phelps Expert Report, paras 2.11 and 6.1-6.7. Math involves more than addition and subtraction, and Mr. Davidson's work to develop the model and ensure that he had the correct type of inputs for the model is what the Court understood him to have done, and what he needed to do in order to provide useful and reliable evidence to the Court about how damages ought to be calculated.

[83] The following exchange in cross-examination shows that what Mr. Davidson did in relation to the other experts was explored, and appeared to have been understood by CPR's trial counsel:

> Q And you did not independently test the reasonableness of the opinions and conclusions of what we've been calling the "sub-experts" in your direct evidence?
>
> A I'm not sure that that's a fair statement entirely. I had regard to who the experts were. I had regard to their experience in the industry and the -- and the matters that they were being asked to opine on, and I had an opportunity to understand how they had founded their conclusions and the like. So I -- I think all of that is part and parcel of -- of that exercise.
>
> Q Okay. And -- and that's helpful and not surprising to me. But, for example, if we take a -- a -- one of the concepts that was addressed, which is market absorption, you didn't conduct your own calculation of market absorption; you relied on that that had been done?
>
> A I did not do my own calculation of it, nor did I go and retain another expert to see if he got the same answer as the first expert (Tr: 2589, lns 20-33. See also, Tr 2589-2594).

[84] Further, Mr. Davidson's broader loss quantification function does not raise issues with respect to the independence of his testimony any more than one would call into question the independent expertise of an engineering firm who designed a bridge, ensured that the materials and contractors for building the bridge were available and appropriate, and then constructed the bridge, simply by virtue of the fact that the firm was involved in all aspects of the bridge construction.

[85] The complexity of designing a model, ensuring that the inputs for that model from other experts are appropriate, and calculating the damages based on the model and the inputs, also justifies a fee higher than that charged by the other experts employed by Remington.

[86] CPR sought to rely on the fees charged by Mr. Dyack of $220,000 as a comparator to suggest that the Duff and Phelps fees were unreasonable. As the Court's reasons make clear, however, there is no real comparison between the qualifications of, and the sophistication, reliability and completeness of the evidence offered by, Mr. Davidson and Mr. Dyack. See ***Remington***, 2022 at paras 1110-1123. The amount of Mr. Dyack's fees does not elucidate the reasonableness of the Duff and Phelps fees.

[87] I have given serious consideration to the other points made by the Defendants, and to the general question of whether the total amount billed by Duff and Phelps goes beyond that which is reasonable and proper.

[88] There is no question that the rates charged by Duff and Phelps were very high. So were the hours recorded. The Defendants have also identified numerous specific examples of

discrepancies in the bills – where, for example, the time entered by one party to a meeting or phone call does not match the time entered by the other party who was there.

[89] Based on the record before me, however, I am not prepared to conclude that Duff and Phelps billed dishonestly, which is what the Defendants imply by using words like "systematic inflation", "inflated docket entries" and "inflated time keeping". The Defendants make a serious allegation and one that precludes innocent or benign explanations for the discrepancies they have identified in the Duff and Phelps invoices. It is one thing to submit that Remington has not discharged its obligation to show that its expert fees were reasonable and proper, and to support that submission by pointing to discrepancies in the invoices that Remington has not explained. It is quite another to review an invoice and, through interpreting the entries, accuse the person who made them of having inflated – i.e., been dishonest in recording – their time. That is particularly so where the person is not a party to the proceeding and thus has no opportunity to defend themselves against such a serious allegation.

[90] Ultimately, though, I am satisfied that the Duff and Phelps fees are too high to be reasonable and proper. The hours and rates charged, and the quantum relative to the other Remington experts (whose collective fees total $561,953.46) are simply too high to be acceptable in a costs award. A 50% reduction in the Duff and Phelps fees, to $750,751.75, is necessary for those fees to be reasonable and proper.

[91] As a result, the total expert fees to be recovered by Remington are $1,312,705.21 along with $4,820.15 in expert disbursements.

Conclusion

[92] Remington is entitled to recover from the Defendants $2,573,592.28 in legal fees, $112,488.12 in legal disbursements, $1,312,705.21 in expert fees and $4,820.15 in expert disbursements, for a total costs award of $4,003,605.76.

Heard on the 4th day of August, 2023.
Dated at the City of Calgary, Alberta this 20th day of October, 2023.

A. Woolley
J.C.K.B.A.

Appearances:

Grant Vogeli, KC/Michael Donaldson KC/Shannon K. Hayes – Lawson Lundell LLP
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for the Defendant, His Majesty the King in Right of Alberta, as represented by the Minister of Infrastructure and the Minister of Transportation