

In the Court of Appeal of Alberta

Citation: Geophysical Service Incorporated v Plains Midstream Canada ULC, 2024 ABCA 385

Date: 20241127
Docket: 2201-0267AC
Registry: Calgary

Between:

Geophysical Service Incorporated

Appellant

- and -

Plains Midstream Canada ULC and BP Canada Energy Group ULC

Respondents

The Court:

The Honourable Justice Elizabeth Hughes*
The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker

Memorandum of Judgment Regarding Costs

*Justice Hughes did not participate in the disposition on costs.

Memorandum of Judgment Regarding Costs

The Court:

[1] On September 29, 2023, the panel dismissed Geophysical Service Incorporated's appeal of a chambers judge's order issued in November 2022, wherein the chambers judge summarily dismissed the appellant's claim against the respondents: *Geophysical Service Incorporated v Plains Midstream Canada ULC*, 2023 ABCA 277. The panel did not immediately address costs of the appeal because the chambers judge first had to determine costs payable in the court below.

[2] On October 22, 2024, the chambers judge issued an endorsement awarding costs to the respondents on a scale of double Column 5 of Schedule C of the *Alberta Rules of Court*, Alta Reg 124/2010. The parties agree that this scale applies to costs of the appeal, but are unable to reach agreement regarding two issues: (1) the impact on item 19(1) (preparation of factum) of a formal offer served by each of the respondents on the appellant on June 13, 2023, being two days before the respondents filed their joint factum, and (2) whether the respondent, BP Canada Energy Group ULC, should be entitled to claim second counsel fees for the appeal. The appellant does not dispute that a doubling of costs for items 19(2) and 20(a) in each of the respondents' Bill of Costs is justified.

[3] Regarding the first issue, the parties agree that the principles outlined in *H2S Solutions Ltd v Tourmaline Oil Corp*, 2020 ABCA 201 apply. There, the Court considered the effect of rules 14.59 and 4.29 dealing with formal offers to settle and determined the primary factors bearing upon the question of whether the double costs rule has been triggered and should be applied include the timing of the offer, the content of the offer, whether the offer is beyond *de minimis*, and any special circumstances.

[4] The appellant points primarily to the timing of the formal offers and suggests this Court should find they were "geared toward simply triggering cost consequences rather than encouraging settlement": appellant's written submission on costs at para 10. The appellant submits that the respondents had inevitably incurred costs towards preparing the joint factum by June 13 (the date of the formal offers), so the appellant had no meaningful opportunity to avoid costs associated with the preparation of a factum provided for by item 19(1) in the Bill of Costs. In this respect, the appellant relies on language from paragraph 30 of *H2S* which states:

Pursuant to Schedule C, item 19(1), typically a respondent does not incur tariff appeal costs until its factum preparation is underway. But, if an offer is made *before* a respondent incurs costs but does not expire until *after* costs have been incurred, there is no principled basis for this Court to refuse awarding double costs to the successful offeror for all claimable tariff items. **The reason for this is that the offeree had the option of accepting the offer before any costs were incurred by the offeror, but did not.** What began as an offer revealing no identifiable and

sufficient compromise becomes, over the course of its currency, a genuine offer of compromise to forego costs accumulated. [emphasis added]

[5] We do not consider the foregoing highlighted language to be dispositive of this matter because the next sentence of that paragraph speaks to the possibility of a genuine offer of compromise revealing itself over the course of the currency of a formal offer. In this respect, had the appellant accepted the formal offers prior to their expiry, the respondents would have foregone the collection of costs for preparation of their factum. As such, there was an identifiable compromise contained in the formal offers: *H2S* at para 35. Further, there are no special circumstances prompting us to exercise our residual discretion to disallow double costs: *H2S* at para 39.

[6] We conclude the respondents are each entitled to claim double costs in relation to item 19(1) in their Bill of Costs.

[7] Regarding the second issue, we agree with the appellant that BP should not be allowed to claim fees for second counsel in the circumstances of this case. While the parties relied upon the appellant's voluminous extracts of key evidence, this was a smaller record than what was filed in the court below, which counsel was already familiar with. In addition, the issues on appeal itself were not complex and second counsel did not address the Court. As a result, BP shall not include item 20(b) in their Bill of Costs.

[8] The respondents are each entitled to double costs under Column 5 of Schedule C for items 19(1), 19(2) and 20(a).

[9] There shall be no costs payable by either party for this application to settle costs.

Written submissions filed November 18, 2024

Memorandum filed at Calgary, Alberta
this 27th day of November, 2024

Ho J.A.

Authorized to sign for:

Kirker J.A.

Appearances:

R.J.D. Gilborn
L.A. Wong
for the Appellant

D.R. McKinnon
C.J.E. Mackey
for the Respondent, Plains Midstream Canada ULC

M.R. Lindsay, KC
C.M.L. Otto-Johnston
for the Respondent, BP Canada Energy Group ULC