

Court of King's Bench of Alberta

**Citation: A.C. Waring & Associates Inc v. The Next Generation Realty Corporation 2024
ABKB 766**

**Date: 20241220
Docket: B103 731282
Registry: Edmonton**

In the Matter of The Bankruptcy of Optam Holdings Inc.

Between:

**A.C Warin & Associates Inc., Trustee in Bankruptcy of the Estate of OptJ:1.M Holdings
Inc.**

Applicant

- and -

**The Next Generation Realty Corporation, 1505116 Alberta Ltd., James (Tug) Knowlton,
Shelley Knowlton, The Next Generation (Kent Clark) Realty Inc., Kent Clark, 1433906
Alberta Ltd., Ryan Sellers and Andiamo Electric Ltd**

Respondent

**Ruling on Costs
of the
Honourable Justice M.E. Burns**

[1] This matter was before me on November 23, 2023 at which time I gave my reasons and decision. I asked the parties to agree on costs, failing which, I directed them to provide me with a three-page written brief on costs by January 9, 2024.

[2] At the application before me, the Trustee applied to set aside a share swap as a transfer at under value pursuant to s.96 of the *Bankruptcy and Insolvency Act*. Next Gen (the respondents) resisted that application on several fronts including an argument for laches originally made in front of Justice Dunlop but adjourned to be heard in conjunction with the Trustee's application.

[3] The hearing was contentious and although heard in a day, involved me reading 8 briefs and literally hundreds of pages of material. The gist of my decision was that Next Gen were not successful on their limitations, laches or s. 37 arguments (the procedural arguments) but were successful at the end of the day because the Trustee failed to establish its s. 96 application. (I am also to take into account that Justice Dunlop dismissed a Rule 4.31/4.33 argument advanced by Next Gen and that the October hearing before me was adjourned due to issues being raised at the last minute).

[4] The Trustee (who was represented by one counsel for the substantive argument and a separate counsel on the procedural issues) argues that the parties should bear their own costs, or alternatively costs should be awarded based on issues. Next Gen argues that it should be granted enhanced costs at 4 times Column 3 of Schedule “C” payable by the Trustee personally.

[5] Section 197(1)(2) and (3) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “BIA”) provides that:

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

Rule 3 of the *Bankruptcy and Insolvency General Rules*, Can Reg 368, CRC 1978, c 368, provides that in cases not provided for in the *Act* or *Rules*, the jurisdiction’s procedure will apply, where they are not inconsistent.

[6] There is no doubt that Rule 10.31 of the *Alberta Rules of Court* grants me a broad general discretion to order costs.

[7] Next Gen argues that enhanced costs are warranted given “misconduct engaged in by the Trustee”. I am not prepared to find that the Trustee engaged in misconduct. While the Trustee was wrong in its position with respect to the s. 96 allegations, and any assertion under s. 96 is likely to result in contested and contentious positions, I do not find that the conduct of the trustee warrants enhanced costs. Nor do I find that the Trustee should personally bear the costs. I do not find that the trustee presented a “bare bones skeletal case just sufficient to invoke the presumption”. While the Trustee’s argument was not a successful argument, I do not find it was trivial or “patently indefensible”. (I do note that there was reference to a privileged email exchange in the costs submissions that was accidentally disclosed. I have not reviewed the exchange and it does not impact this decision). With respect to concerns that the bankruptcy estate will not have assets available, I understand the Trustee has confirmed that it does in fact have assets to cover a cost award.

[8] While it is possible to award costs on an issue by issue basis, I am not prepared to do so in this case. Next Gen lost some arguments, but at the end of the day they did have substantial

success. It is entitled to costs. I do not agree this is a case where full indemnity or solicitor client costs are appropriate given my findings with respect to the Trustee's conduct. However, I am satisfied that Schedule C, Column 3 costs are insufficient, given the nature of the application, the complexity of the issues and that the decision resolves most outstanding issues between these parties. I am prepared to award three times Colum 3 of Schedule C as claimed in Next Gen's draft Bill of Costs. I note that there are no costs included relating to the appearance before Justice Dunlop and the adjourned October hearing. This is fair and reasonable given Next Gen's lack of success on those occasions. I calculate that number to be (rounded) \$33,950. I direct that cost be paid to Next Gen of \$33,500 by the Trustee from the estate (not personally).

Written Submissions provided on the 9th day of January, 2024.

Dated at the City of Edmonton, Alberta this 20th day of December, 2024.

M.E. Burns
J.C.K.B.A.

Appearances:

Bryan Maruyama, Parlee McLaws LLP
for the Applicant

Coralie Mohr, Witten LLP
for the Trustee

Scheel S. Hussein, Bryan & Company
for the Respondent