Court of Queen's Bench of Alberta

Citation: Athabasca Minerals Inc. v Syncrude Canada Ltd., 2018 ABQB 551

Date:20180719
Docket: 1201 13727
Registry: Calgary

Between:

Athabasca Minerals Inc.

Plaintiff/Defendant by Counterclaim

- and -

Syncrude Canada Ltd.

Defendant/Plaintiff by Counterclaim

Ruling on Costs
of the
Honourable Mr. Justice C.M. Jones

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[1] Syncrude Canada Ltd. ("***Syncrude***") made application against Athabasca Minerals Inc. ("***AMI***") for various forms of prejudgment relief. Syncrude sought the following interim and interlocutory orders:

1. Preserving all reclamation soil – in situ and stockpiled subsoil and overburden - within the boundaries of Mineral Surface Lease 973220 granted by the Province of Alberta in favour of Syncrude pending trial and judgment (the "Preservation Order");
2. Alternately, directing AMI to pay $55 million or such other amount as the Court deems just, into Court, and delivering possession of the reclamation soil to Syncrude;
3. Attaching the assets of AMI pursuant to s. 17 of the Civil Enforcement Act, RSA 2000, c-15 ("CEA"), pending trial and judgment (the "Attachment Order");

4. Enjoining AMI from dealing with, conveying, selling, encumbering or otherwise disposing of any interests in personal or real property or assets in its possession or control and wherever located, without further order of the Court, pending trial and judgment (the "Mareva Injunction"); and
5. Costs.

[2] My decision is reported at ***Athabasca Minerals Inc v Syncrude Canada Ltd,*** 2017 ABQB 47. I declined to grant any of the relief sought by Syncrude as outlined in 1 through 4 above.

[3] The parties could not agree on costs. I directed them to make written submissions.

Background

[4] Syncrude and AMI found themselves in dispute concerning the rights conferred on them under various agreements with, and approvals issued by, the Province of Alberta.

[5] Syncrude carries on an oil sands extraction and processing operation. AMI managed the removal of sand and gravel on behalf of the Province from a deposit in northern Alberta.

[6] In 2012, AMI commenced an action against Syncrude. AMI asserted that Syncrude was indebted to it in the approximate amount of $620,000.00. AMI asserted that Syncrude removed surface materials from the deposit in issue and failed to pay for those materials and for the full amount of management fees payable to AMI.

[7] Syncrude responded with a counterclaim in the amount of $68,000,000.00. It alleged that AMI wrongfully permitted excavation, removal and use of reclamation material from an area of Syncrude's mineral lease that overlaps with the area under management by AMI. Syncrude asserted a right to exclusive use and possession of that material for purposes of meeting its reclamation obligations.

[8] AMI claimed that Syncrude's request for prejudgment relief was a litigation tactic designed to put it out of business and deprive it of the financial resources it would need to advance its action against Syncrude.

Costs Submission

[9] AMI proposes that it receive costs on a party-and-party basis, at a multiple of three times column 5, found at Division 2 of Schedule C of the ***Alberta Rules of Court,*** **Alta Reg 124/2010** ("***Rules***"). In connection with its request, AMI submits a Bill of Costs.

[10] That Bill of Costs seeks:

a) Fees	$ 98,518.32
b) Disbursements (subject to 5% GST)	$ 12,042.41
c) Disbursements (not subject to GST)	$ 463.89
d) Other Charges (subject to 5% GST)	$ 1,113.16
e) GST	$ 657.78
	$112,795.56

[11] Syncrude proposes that costs be in the cause, on a party-and-party basis. However, should the Court be inclined to award costs payable forthwith, Syncrude proposes its own Bill of Costs. That Bill of Costs proposes fees of $18,550.00.

[12] In support of its Bill of Costs, AMI argues that:

1. It should be entitled to enhanced costs;
2. An inflation factor should be applied in arriving at a costs award; and
3. AMI should be entitled to costs forthwith and I should not direct that costs in respect of the matter before me be in the cause.

[13] AMI's comments regarding costs awards generally may be summarized as follows:

1. Costs are discretionary and may be awarded in any amount the Court considers appropriate: Rule 10.33; British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71, [2003] 3 SCR 371 ("Okanagan Indian Band");
2. Rule 10.33(1) identifies considerations which may be taken into account in making a costs award;
3. The Court may consider the actual legal bills of the successful party: Rule 10.33(1)(g); Hill v Hill, 2013 ABCA 313 (CanLII), 3 Alta LR (6th) 302 ("Hill");
4. Rule 10.33(2) identifies considerations the Court may take into account in imposing a costs award; and
5. Costs may be used to sanction behaviour that increases the duration and expense of litigation or is otherwise unreasonable or vexatious: Okanagan Indian Band at para 25;

Enhanced Costs

Applicable Column

[14] AMI argues that it should be entitled to enhanced costs, claiming that Syncrude's application for prejudgment relief threatened AMI's ability to continue operating. AMI asserts that had the relief sought been granted, it would have been incapable of pursuing its debt claim against Syncrude and defending Syncrude's counterclaim.

[15] AMI argues that had Syncrude been successful in its application before me, it would have allowed Syncrude to circumvent the litigation process. It would have effectively allowed Syncrude to obtain the remedy it ultimately sought in the litigation.

[16] In essence, AMI asks this Court to impose a form of penalty on Syncrude. It asserts that Syncrude was misusing its right to request prejudgment relief by seeking, through the vehicle of prejudgment relief, to avoid the orderly administration of justice by means of a trial.

[17] AMI argues that Syncrude sought to have AMI pay $55 million into Court in addition to any other relief sought.

[18] I agree with AMI that, for purposes of determining what, if any, column is applicable, Syncrude requested a monetary award. Whatever attachment relief Syncrude sought was in addition to its request for $55 million, which can be viewed as a monetary proxy for the value it placed on sand and gravel *in situ*.

[19] Syncrude does not appear to dispute the assertion that column 5 is applicable. It employs column 5 in arriving at fees depicted in its draft Bill of Costs.

[20] Clearly, $55 million sought is well beyond the range contemplated by column 5 of Schedule C.

Degree of Appropriate Enhancement, if Any

[21] AMI argues that this is an appropriate case to apply a multiplier to the various column 5 items shown on its draft Bill of Costs. It asserts that an award of costs should indemnify the successful party for approximately 40% to 50% of a lawyer's reasonable bill: ***Trizec Equities Ltd. v Ellis-Don Management Services Ltd.,*** 1999 ABQB 801 at para 22 (CanLII), 251 AR 101; ***Marathon Canada Ltd. v Enron Canada Corp.*** 2008 ABQB 770 at para 30 (CanLII), 100 Alta LR (4th) 356 ("***Marathon***"); ***LSI Logic Corp of Canada Inc. v Lagani,*** 2001 ABQB 968 at para 16 (CanLII), [2002] 4 WWR 531 ("***LSI***"); ***Stewart Estate v 1088294 Alberta Ltd.,*** 2016 ABCA 144 at para 26 (CanLII), [2016] AJ No 454 (QL).

[22] It argues that this Court should apply a multiplier to column 5 items, the appropriate multiplier having been arrived at with reference to the considerations laid out in ***Rules*** 10.33(1) and 10.33 (2), and its conclusions based on its review of the decisions in ***Marathon***; ***Blaze Energy Ltd. v Imperial Oil Resources,*** 2014 ABQB 509 at para 81 (CanLII), [2014] AJ No 916 (QL) ("***Blaze***"); ***Hill***; ***Murphy Oil Canada v Predator Corp.***, 2005 ABQB 134 (CanLII), 379 AR 388 ("***Murphy***").

[23] AMI cites various cases where multipliers have been used. It alleges that in certain of these cases, multiples were applied in the absence of any assertions of misconduct. In other words, multiples were not applied to punish the unsuccessful party.

[24] AMI cites the decision in ***Blaze***, referred to above, where this Court applied a 1.5 multiple to column 5 items, noting that the litigation was commercially significant to the parties.

[25] In ***Murphy***, where a 6 multiple was employed partly in response to the conduct of the parties, AMI notes that the Court did not accept the defendant's argument that a multiple should not be used in what might be referred to as summary proceedings, as opposed to a trial.

[26] The Court in ***Murphy*** referred to this Court's finding in ***LSI***. There, the Court noted that "the time of the actual hearing is not a proper gauge of the complexity of the issues": ***LSI*** at para 9. AMI argues that Syncrude's application took two days, involved significant preparation during a compressed period of time, and involved a significant volume of materials, including voluminous affidavits, transcripts and undertaking responses from witness testimony.

[27] AMI understates the matter. As Syncrude was the applicant, most of the material filed was prepared by it. AMI was required to respond to those filings.

[28] Just how much material did the parties file? Five days had to be allocated to reading time.

[29] Seven days of Court time were thus consumed. As the matter related to Syncrude's request for immediate injunctive relief, it became necessary for the Court to make special arrangements to allocate time to hear Syncrude's request.

[30] AMI notes that a multiple of column items is not the only option available in making an award of enhanced costs. It cites this Court's decision in ***Mikkelson v Truman Development***

Corp, 2016 ABQB 255 at paras 48-49 (CanLII), 2016 CarswellAlta 833 (WL Can) ("***Mikkelson***"). There, the Court noted:

> 48 When costs awarded pursuant to the Tariff would be inadequate, the Court has numerous options available, as discussed by the Court of Appeal in ***Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.,*** 1998 ABCA 118 (Alta. C.A.) at para 4, leave to appeal to SCC refused, 25594 (1 May 1997) [1997 CarswellAlta 1286 (S.C.C.)]:
>
> > …There are different ways to adjust Schedule C when its product seems inadequate: higher column, multiples of a column, a multiplier for inflation or otherwise, extra lump sums, some form of solicitor-client costs, and so forth. Several modes of adjustment may be reasonable; indeed several different modes may amount to much the same thing. The ultimate question is whether the final total is reasonable or not.
>
> 49. Pursuant to ***Rule*** 10.31(1)(b)(ii), this Court may award a lump sum instead of or in addition to assessed costs.

[31] AMI cites ***Mikkelson*** for the proposition that a party's actions may justify an award which goes some considerable way to indemnifying the successful party in respect of their actual legal costs.

[32] AMI argues that the fact that Syncrude failed in its application means that AMI should receive enhanced costs. It claims that AMI's actual legal costs relating to Syncrude's application were $199,604.00.

[33] It argues that it should receive a fair and reasonable indemnity of 40% to 50% of its actual legal costs. This, it asserts, should be a bare minimum.

[34] Indeed, AMI argues that it should receive global indemnity of 50% to 60% of its actual legal costs because Syncrude is guilty of misconduct. AMI offers, in support of this allegation, the observation that Syncrude's counterclaim was one hundred times larger than AMI's claim against Syncrude. Further, it argues, had Syncrude been successful in its request for prejudgment relief, AMI would have had to cease operations and have gone out of business.

[35] AMI takes the position that Syncrude's application for prejudgment relief was entirely unnecessary. It only served to increase the time and resources spent on what might become a long and protracted trial.

[36] Lastly, in its request for enhanced costs, AMI cites para 155 of my decision. There, I noted that:

> I mention in passing that AMI pointed out that a prejudgment preservation order should not be used as a tactical weapon against a defendant who has a valid defense to the claim: see ***1773907 Alberta Ltd v Davidson*** at para 73. I have had some disquiet at the fact that Syncrude's response to AMI's action against it included a counterclaim for more than one hundred times the amount sought by AMI. To be sure, Syncrude is free to assert a counterclaim in whatever amount it thinks fit. Nevertheless, the Court must exercise great care to ensure that the quantum of an as yet unproven claim does not, by itself, influence the assessment of the merits of the application for prejudgment relief. Prejudgment relief,

> especially when it has the potential to limit the respondent's ability to carry on business and to proceed with litigation, must not be allowed to be used improperly.

[37] This, AMI suggests, evidences the Court's condemnation of Syncrude's conduct in this matter and supports the request for enhanced costs.

[38] In response, I would note that it was AMI that raised the issue of tactics. I commented that Syncrude was free to assert a counterclaim in whatever amount it thought fit.

[39] I noted that it is the Court's responsibility to exercise care to ensure that it does not allow the quantum of a claim to overwhelm a consideration of the merits of an application for prejudgment relief. I did not say that it was the parties' responsibility to limit the extent of relief they believe they are otherwise entitled to receive just because the quantum of a claim and of a counterclaim are vastly disproportionate.

[40] I noted that I had "some disquiet" regarding the size of Syncrude's counterclaim in relation to AMI's original claim. That disquiet served to remind this Court of the importance of focusing on the substantive merits of the parties' positions and not to be unduly influenced by relative sizes of the amounts claimed.

[41] In any event, AMI concludes by seeking a multiple of three applied to column 5 amounts.

[42] Syncrude argues that if costs are payable at this time, they should be computed with reference to its draft Bill of Costs. As noted above, it agrees that column 5 is applicable. It disputes AMI's claim for disbursements in respect of travel costs for out-of-town counsel for a matter that was commenced in the Judicial Centre of Calgary.

[43] Syncrude argues that multiples of column amounts are the exception, not the rule. It points to the decision of this Court in ***Shefsky v California Gold Mining Inc.,*** 2015 ABQB 525 at para 21 (CanLII), 2015 CarswellAlta 1857 (WL Can) ("***Shefsky***"). There the Court declined to find that costs on the basis of any multiple were warranted: ***Shefsky*** at paras 27-28.

[44] Syncrude argues that the procedural matrix in ***Shefsky*** was analogous to that before me. I agree with Syncrude in that regard, though it is difficult to confidently assess the degree of complexity which actually confronted another Justice of this Court by simply reading their reasons for judgment.

[45] I ultimately arrive at my costs award without significant reliance on the application of Schedule C to AMI's draft Bill of Costs, other than comparing the two to ensure that the draft Bill of Costs did not purport to reflect steps which could not responsibly have been taken. Accordingly, it is unnecessary for me to decide if a multiplier is appropriate in these circumstances. I would note, however, that were I not to adopt a percentage of fees incurred approach, I would consider it necessary to use a multiplier in respect of column 5 amounts.

Inflation Factor

[46] AMI argues that I should apply an inflation factor of 40.64 per cent to any costs award. This, it argues, has been common practice in Alberta courts.

[47] It states that the 40.64 percent rate represents the Bank of Canada rate to account for inflation between 1998 and 2017, being the last time Schedule C was revised.

[48] I note Justice Kenny's decision in ***Chisholm v Lindsay,*** 2013 ABQB 589 ("***Chisholm***"). Quoting from her decision at para 29:

> It is up to the legislators to determine an appropriate Schedule C and to revise it as required from time to time. It is not up to the courts to undertake that analysis on a case by case basis.

[49] Schedule C is the product of legislation. It is not "judge made". An argument can be made that if dollar values set forth in Schedule C are out of date, it falls to those responsible for implementing legislation which enacts amendments to the ***Rules*** and its Schedules to determine appropriate standards.

[50] AMI directs my attention to the decision of our Court of Appeal in ***RVB Management Ltd. v Rocky Mountain House (Town),*** 2015 ABCA 304 ("***RVB***"). There, the Court of Appeal speaks to its review of Justice Kenny's decision in ***Chisholm***.

[51] At paragraph 9 of ***RVB*** the Court comments:

> Chisolm does not stand for the proposition that Schedule C must or must not be adjusted for inflation. It merely confirms at para. 49 that trial judges have a wide discretion over costs, and that the costs award in that case (considered globally) did not contain any error warranting appellate interference.

[52] Indeed, at paragraph 8 of ***RVB***, the Court also notes:

> The re-enactment of the Rules continued the historically wide discretion of trial judges to award costs, and was made against the background of numerous judicial decisions that had been adjusting Schedule C for inflation. The re-enactment should be interpreted on the assumption that, where appropriate, that practice could continue.

[53] The Court concluded on this topic at para 11:

> It was not an error in principle for the trial judge to adjust the costs for inflation, and that aspect of the award does not reflect any other reviewable error.

[54] Concerns with the propriety of applying an inflationary component to a costs award were summarized in ***Cogent Group Inc. v EnCana Leasehold Limited Partnership,*** 2014 ABQB 593 at para 35 (CanLII), 597 AR 178:

> To expect the courts, on a case by case basis, to adjust Schedule C amounts for "inflation", absent:
> (a) evidence of the effects of inflation on legal costs (as opposed to other goods and services);
> (b) evidence of the effects of inflation on legal costs incurred in civil litigation matters such as this matter (as opposed to its impact on fees charged for other services, such as mergers and acquisitions, tax, family or wills and estates matters); and
> (c) expert evidence on the selection of an appropriate indice or guideline, reflective of cost increases in the particular geographic region where the parties live or work (as opposed to what might be the appropriate indice or guideline in another part of the country and assuming the Court has some rational basis for selecting a particular

> region which it thinks accurately reflects the parties' cost of living or, in the case of a corporation such as EnCana, it costs of capital),

is to set the stage for potentially significantly different results, from different courts within the same jurisdiction in respect of substantially similar matters. I have difficulty understanding how that exercise would promote equal access to justice and its fair and consistent delivery.

[55] To my knowledge, those views were not challenged on appellate review. AMI has not provided me with sufficient evidence that would address items (a), (b) and (c) above.

[56] Syncrude argues that inflation should only be applied to Schedule C amounts where it is warranted by special circumstances, such as the effluxion of time or where legal fees were paid at a higher dollar value.

[57] It asserts that no extraordinary circumstances exist here. It believes that Schedule C itself represents a reasonable apportionment of the litigation expenses incurred by AMI.

[58] Again, by adopting an approach based on percentage of fees incurred, I avoid the need to consider inflation in respect of Schedule C amounts. For reasons noted below, I believe that inflation is accounted for in that approach.

Percentage of Fees Incurred

[59] That is not to say that AMI is not entitled to enhanced costs, if "enhancements" are to be viewed with reference to amounts otherwise prescribed in Schedule C. It just strikes me as contortionist to apply both a multiple of Schedule C column amounts and an inflation factor, when the object is to arrive at a figure which provides 40% to 50% indemnification.

[60] Why not simply approach the matter that way and avoid reverse engineering once the number has been arrived at in order to justify it on the basis of inflation and/or multiples? Inflation, as it would have otherwise applied to amounts prescribed in schedule C, is presumably already accounted for in the actual fees charged to AMI by its counsel.

[61] It is, of course, necessary to have limited reference to Schedule C in order to perform a reality check. AMI claims that its lawyers have performed certain tasks and its draft Bill of Costs refers generally to the individual line items comprising work done. It claims to have spent $199,604.00 in securing those legal services.

[62] Applying individual line item amounts from a particular column in Schedule C may make sense in a simpler situation. But here, the individual line items in Schedule C likely bear very little relation to the amount of effort actually required of AMI to respond to Syncrude's application.

[63] Simply put, the nuances involved in cross examination or appearance at a contested application in this matter will differ from those involved in another matter. Schedule C amounts in respect of particular line items do not account for those differences.

[64] Because of the differences inherent in most litigation undertakings, attempting to fairly account for these differences by resorting to a higher column based on a larger amount of money in issue is, to some extent, a contrivance and likely, a poor approximation of the value of work performed. It is therefore, a poor approximation of the financial consequences which the losing party should have to bear by way of partial indemnification of the successful party.

[65] Of course, these shortcomings are recognized by all. The need to make artificial and arbitrary adjustments to Schedule C amounts (which have not been adjusted in twenty years) largely disappears in a situation such as this, where the parties are sophisticated, capable of engaging competent counsel of their choice and costs are awarded on the basis of 40% to 50% indemnification for actual legal fees incurred.

[66] Some adjustment might be warranted if a parties' conduct was particular egregious.

[67] However, it is unnecessary to adjust for:

1. the complexity of the matters in issue;
2. a compressed time frame;
3. the number of deponents to be examined;
4. the volume of material to review: or
5. inflation,

as these matters will undoubtedly have been reflected in the aggregate fees charged by AMI's counsel.

[68] Having regard to the factors enumerated in ***Rule*** 10.33, I am satisfied that ordering Syncrude to pay a percentage of AMI's reasonable legal fees incurred to defend the application is an appropriate way to determine AMI's reasonable and proper costs in this case. I do so without reference to dollar amounts in Schedule C, as ***Rule*** 10.31(3)(a) permits me to do when making a costs award under ***Rule*** 10.31(1)(a).

[69] Further, to argue that a global indemnity should be raised from 40% to 50% to 50% to 60% because Syncrude's counterclaim far exceeded AMI's original claim or because, had I found favor with Syncrude's arguments and granted the relief it sought AMI may have had to cease operations, is tantamount to arguing that:

1. Syncrude should have arrived at the quantum of its counterclaim not by assessing the extent of its financial loss allegedly at the hands of AMI, but rather on the basis of its potential financial loss at the hands of the Court, should it incur an adverse costs award; and
2. Syncrude is under some obligation to formulate its litigation strategy with reference to AMI's potential prospects for long term survival.

These two propositions are inconsistent with our adversarial system of justice and are unsupported by the case law. I therefore decline to grant AMI costs on the basis of 50% to 60% of its reasonable legal fees. I would instead award costs on the basis of 45% of AMI's reasonable legal fees.

Should costs be payable forthwith

[70] AMI notes that ***Rule*** 10.29(1) provides that a successful party is entitled to costs forthwith. The burden is on the losing party to justify why the court should exercise discretion to allow payment of costs in the cause: ***Enviro Trace Ltd. v Scheichuk,*** 2015 ABQB 28 at para 7 (CanLII), 25 Alta LR (6^{th}).

[71] Syncrude argues that costs in the cause are fair where one party (Syncrude) seeks an interlocutory step as necessitated by the suit itself, and neither party was guilty of misconduct in taking such a step.

[72] Further, Syncrude argues that where the result of an interlocutory application may be viewed differently following the determination at trial, the party who made the application should not be burdened with the penalty of costs in the interim: ***Johannesen, Re,*** 2002 ABQB 946 at para 3 (CanLII, 6 Alta LR (4^{th}) 304. It argues that where issues raised in the application overlap with the trial issues and the effect of the injunction remains reversible, it is inappropriate to require costs to be payable forthwith: ***Stonewater Group of Restaurants Inc. v Mikes Restaurants Inc.,*** 2005 ABQB 964 at paras 5-6 (CanLII), 2005 CarswellAlta 1906 (WL Can).

[73] Syncrude argues that the issues raised in its Application overlap with the issues raised in this Action. Syncrude posits that it would be unfair to require Syncrude to pay costs forthwith, given that the decisions I made in response to Syncrude's Application may be reversed at trial. That, of course, assumes the matter actually goes to trial and that the parties do not, based on the analysis that formed the basis for my decision regarding Syncrude's Application, arrive at a settlement.

[74] Failing a direction that costs should follow the cause, Syncrude requests that costs associated with its Application before me be payable at the conclusion of the Action: ***566320 Alberta Ltd. v Lethbridge (City),*** 2005 ABCA 244 at para 10.

Decision on Payment of Costs

[75] Syncrude has not justified departure from the rule that costs should ordinarily be paid forthwith. AMI was required to respond to a serious challenge to its activities.

[76] Syncrude's challenge required AMI to devote considerable resources to defending its position. AMI's efforts in that regard proved to be successful.

[77] It would be unfair to AMI to deny it access to the default rule. There would appear to be a disparity in financial resources available to the two parties to the Application before me. In such situations, failure to award costs forthwith would, in my view, invite misuse of the prejudgment relief process. A party with greater financial resources might be motivated to misuse that process in an attempt to render the other party incapable of continuing with the litigation.

[78] Costs are a necessary consequence of a decision to initiate legal proceedings. Syncrude must face those consequences.

[79] AMI shall have its cost paid forthwith.

[80] With respect to disbursements, I agree with Syncrude that it would not be appropriate to award out-of-town counsel's expenses, based on the reasoning in ***Hansraj v Ao,*** 2002 ABQB 772 at paras 14-15 (CanLII), [2002] 11 WWR 688.

[81] In the result, I award costs in favor of AMI in the amount of $89,821.00 representing fees calculated as 45% of legal costs AMI asserts were actually incurred. I note in passing that this amount is reasonably close to the amount reflected by AMI in its draft Bill of Costs in respect of fees.

[82] Disbursements and other charges are awarded as set forth in AMI's proposed Bill of Costs, with the exception of out of town counsel's expenses.

Written submissions filed on the 23rd day of February, 2017.
Dated at the City of Calgary, Alberta this 19th day of July, 2018.

C.M. Jones
J.C.Q.B.A.

Appearances:

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